THE CRIMINAL LAW

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PREFACE.

Solomon said "of making many books there is no end." Job said "My desire is that mine adversary had written a book." Although it is more than three thousand years since either of these things was said, yet they explain our reasons for writing this book. Giving precedence to Job, as the elder, it is to be noted that Job's meaning was that he had not intended to violate the law, but had intended to conform to it. If he had violated the law, he had done so unconsciously; because there was no existing book which set forth the law in such clear terms that a man could understand it by giving to it that amount of study which might reasonably be expected of one who performed — as Job so eloquently and pathetically tells us he did perform — the other duties which pressed upon him. Job did not mean, as has been insinuated by some authors whose books have been reviewed, that he wished that his adversary had written a book in order that he might have had a chance to review it.

It appears in the sequel, in Job's case, that having intended and tried to do right and not to do wrong, that he had succeeded, and he was not a law breaker, a view of the law which we have tried especially to emphasize in this book.

To return to Solomon. New books must be made because of the changing conditions of life, and because our law follows these changing conditions, and changes with them. There are many matters arising

in the criminal law concerning which the law is different from what it was twenty years ago. There are many other questions which were then in dispute and unsettled, which are now settled. There are doctrines of the criminal law which then appeared to rest upon arbitrary grounds, which we can now see rest upon eternal and fundamental principles. There were then many conflicts of opinion between the courts of last resort in the different States which have now been practically settled.

In writing this book, the ideas suggested by the remarks of Job and Solomon have been in our minds. We have endeavored (keeping Job in mind) to write a book which sets forth the criminal law clearly and tersely, so that a well-intentioned person may, with a reasonable amount of labor, understand it and have no difficulty in avoiding its violation. We have also endeavored (not forgetting Solomon) to write a book which illustrates the criminal law and its tendencies up to the very moment that we go to press.

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ELEMENTS OF A CRIME.

CHAPTER I.

DEFINITION.

A crime is a wilful act, or omission, for which the law prescribes a penalty, enforced by the State in its own name, the act, or omission, being by a person who is criminally responsible, and who has, in doing the act, or omitting the duty, a criminal intent.[1]

MEANING OF WILFUL.

In the foregoing definition of a crime the word wilful means simply, voluntary, or, in other words, the act or omission must be the result of the free exercise of one's conscious volition. An ancient maxim of the common law, "actus non facit reum nisi mens sit

[1] The following are a few of the definitions of crime given by the different authors:

"A crime is any wrong which the government deems injurious to the public at large, and punishes through a judicial proceeding in its own name." I Bish. Cr. Law, Sec. 32.

"An act committed or omitted in violation of a public law, either forbidding or commanding it." 4 Blk. Com., 5.

"An act of disobedience to a law, forbidden under pain of punishment." Harris, 1.

"Crime is a violation or neglect of legal duty of so much public importance that the law, either common or statutory, takes notice of and punishes it." May Cr. Law, 1.

rea,"[2] is often cited in support of the proposition now under discussion. "It is," said Kenyon, C. J., "a principal of natural justice and of our law that the intent and the act must both concur to constitute the crime." Therefore, no man can be held criminally responsible for what he does in his sleep, or in a trance, in a state of delirium, or in any other condition where conscious volition does not exist.

The proposition that in order to be criminal an act must be voluntary, is illustrated by an old writer by the statement that if one seizes the hand of another in which is a weapon, and, in spite of resistance, kills a third person with it, the first only is guilty. And when, by reason of circumstances it is impossible for a public officer to perform a duty enjoined upon him by law, the impossibility is a good defense to an indictment for not performing the duty.[3] And in a number of cases treasonable acts have been held not punishable because done under threats against, and imminent danger of, life.[4]

And it is probable that the law would hold one excused for doing any act otherwise criminal if done under compulsion and to save the life of the one under compulsion. This, at least, seems to be Mr. Bishop's opinion. But this proposition has one qualification. The law will not excuse the taking of the life of an innocent person to save the life of the slayer.[5] And therefore, where there were three persons cast away at sea in an open boat, and they were all slowly starving to death, and two of them took

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[2] "An act does not make a man criminal unless there be a criminal intent."

[3] Tate vs. State, 5 Blackf. (Ind.), 73.

[4] Rex vs. Gordon, 1 East P. C., 71; Res. Publica vs. McCarty, 2 Dall. (Pa.), 86; Trial of MacGrowther, 18 Powell State Trials, 394.

[5] Arp vs. State, 97 Ala., 5; 9 Am. Cr., 517.

the life of the third to save their own, they were held to be guilty of murder.[6]

AN ACT.

1. By act is intended the doing or saying something which does, or might, produce an effect on a person or a thing. A purpose or intent which finds no expression, can never constitute a crime against human law, however clearly it may be an offense against divine law.

AN OMISSION.

2. There are many omissions or neglects to perform a duty enjoined by law, which are criminal. Familiar examples are found in neglecting to provide food or medicine for the helpless by those whose duty it is;[7] refusing or neglecting when called upon to lend a needed assistance to the officers of the law in the execution of a public duty.[8]

LAW.

3. By law is intended a rule prescribed by the Supreme Power of the State; in this country, either by the Congress of the United States, or the legislatures of the several States, or by the common law.[9] The

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[6] U. S. vs. Stephens, 8 Sawy., 116; Reg. vs. Dudley, 15 Cox C. C., 624; 5 Am. Cr., 559; and see U. S. vs. Holmes, 1 Wall, Jr., 1 Fed. Cas. No. 15, 383.

[7] See infra under title Homicide; Territory vs. Manton, 8 Mont., 95.

[8] Firestone vs. Rice, 71 Mich., 377.

[9] "The Common Law includes those principles, usages and rules of action applicable to the government and security of person and property, which do not rest for their authority upon any express and positive declaration of the will of the legislature." 1 Kent Com., 533.

"Our ancestors, when they came into this new world,

limits within which the national and the State governments act in criminal matters are fully defined in the section devoted to jurisdiction of crimes. The

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claimed the common law as their birthright, and brought it with them, except such parts as were judged inapplicable to their new state and condition. The common law thus claimed was the common law of their native country, as it was amended or altered by English statutes in force at the time of their emigration. Those statutes were never re-enacted in this country, but were considered as incorporated into the common law. Some few other English statutes passed since the emigration were adopted by our courts, and now have the authority of law derived from long practice. To these may be added some ancient usages originating probably from laws passed by the legislature of the colony of Massachusetts Bay, which were annulled by the repeal of the first charter, and from the former practice of the colonial courts, accommodated to the habits and manners of the people." Com. vs. Knowlton, 2 Mass., 530.

There is no national common law in the United States, but in most of the states, the common law of England prevails in so far as it is applicable. In a few of the states, common law crimes have been abolished, but even in these as well as in the other states, the common law decisions are often referred to for the purpose of construing the statutes.

An act however atrocious, for which the law does not prescribe a punishment, is not a crime. Thus in Ohio, the court held that an attempt to have carnal knowledge of a child under ten years of age, with her consent, was not a crime, for the reason that the statutes of the state did not prescribe any punishment for such an act, and the common law under which it would have been a crime, had been abolished. State vs. Smith, 12 Ohio St., 466.

This principle is stated by Justice Campbell in the case of Ware vs. Circuit Judge, in 75 Mich., 488, as follows:

"No principle is more universally settled than that which deprives all courts of power to infer, from their judicial ideas of policy, crimes not defined by statute or by common law precedents. Nothing can be a crime until it has been recognized as such by the law of the land. It is a fixed rule that an act must be left to civil remedies, unless it has been recognized as so dangerous to the public as to need repression or punishment as a wrong to the body politic."

GROUND OF PRESCRIPTION.

The ground on which the law prescribes a punishment

breach of an ordinance adopted by the common council of a city or other subordinate body endowed with certain local legislative powers is not a crime.[10]

PUNISHMENT.

4. No act constitutes a crime unless the law

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for certain acts and declares that they are crimes, is that of public policy. Society is bound, for the purpose of self-protection, to guard the wellbeing of the community at large.

The primary object of the law, in prescribing a punishment, is to prevent the repetition of those acts which are injurious to the public good. Acts which work an injury to the individual only, and do not affect other members of the community, or affects them so slightly that the law does not take notice of it, are mere private injuries or torts, for which redress must be had in the civil courts.

It is the policy then of the criminal law, to punish only public, as distinguished from private, injuries. While this is true yet there is no inherent test or criterion by which we can determine whether a given act is to be deemed a public or a private injury.

The moral element, for example, is of little assistance in arriving at such a determination, for on the one hand an act may be grossly immoral and not subject the doer to any legal punishment, while on the other hand, an act perfectly innocent from a moral standpoint may be a crime. So also the same act is regarded as a public or private injury, according as it is viewed by different communities. The sole question in determining whether a given act is or is not a crime, is: Does the law prescribe a vindictive punishment for the same, on the ground of public policy?

The student will notice from examples given in the text, that it is quite possible that the same act may under some circumstances, subject a person to a civil action by the person injured, to obtain redress, and to a criminal proceeding on the part of the state to punish the unlawful act.

A settlement of the civil action (except possibly in case of misdemeanors in some states) does not deprive the state of the right to punish the offender.

Thus it has been held that a woman who has been ravished cannot by her condonation of the offense deprive the state of the right to prosecute. Com. vs. Slattery, 147 Mass., 423.

[10] Williams vs. Augusta, 4 Ga., 509, but see Slaughter vs. People, 2 Doug. (Mich.), 334.

affixes a vindictive punishment to it. Where the law prescribes imprisonment as a purely coercive measure the act for which it is prescribed is not a crime. The distinction will be made most clear by illustration. The law prescribes a vindictive punishment for the offense of obtaining goods by false pretenses. From the standpoint of this law the act of obtaining the goods is a crime. But the statutes of most, if not all, of the States authorize civil proceedings in which a fraudulent debtor may be imprisoned until, and only until, he has made restitution so far as it is within his power. From the standpoint of these statutes the act of fraudulently obtaining the goods is merely a civil injury. Bastardy, although it has sometimes been called quasi-criminal, is not a crime where the only purpose of the law is to compel the putative father to provide for the support of the bastard.[11] So there are two kinds of contempts, one criminal and one civil. Where the act is such that it is punishable by the court, as being an unwarrantable interference with the orderly administration of justice, it is a criminal contempt. Where it is an act in disregard of the rights of a suitor, secured to him by a mandate of the court in a pending suit, it is a civil wrong.[12]

Every act to which the law affixes a vindictive punishment is a crime; it matters not what is the nature of the punishment which the law inflicts. It may be only a fine,[13] or a statutory penalty.

ENFORCEMENT BY THE STATE.

5. An act for which the law prescribes a statutory penalty is regarded as a crime when the enforcement

[11] Cannon's Case, 47 Mich., 481.
[12] See Post under title Contempt.
[13] Re. Clark, 9 Wend., 212; Morton vs. Skinner, 48 Ind., 123.

of the penalty is by the state acting through its own officers by the usual methods of the criminal law. It is not looked upon as a crime when the penalty is to be recovered in a civil action,[14] brought by a private person on his own motion.

CRIMINAL RESPONSIBILITY.

6. The act or omission must be by a person whom the law holds criminally responsible. Every human being of sound mind and of years of discretion is, generally speaking, criminally responsible.

INFANTS.

Children under seven[15] years of age are not criminally responsible for any criminal act whatever, however atrocious.[16] This is put upon the ground that there is a conclusive legal presumption of a lack of criminal capacity. It is hardly possible to define with scientific exactness what is meant by criminal capacity. In a general way it may be defined to be that degree of mental power which enables one to understand the nature of an act (i. e., as to whether the act is right or wrong), and its probable or possible consequences. Between the ages of seven and fourteen years there is a prima facie presumption of a lack of criminal capacity, but this presumption is subject to be rebutted. The presumption is strongest at the lowest age and weakest at the highest. As Mr. Bishop says: "There is a vast difference between a child one day under fourteen years of age, and one

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[14] People vs. Hoffman, 3 Mich., 248; Belcher vs. Johnson, 1 Metc., 148.

[15] In Illinois the State fixes the age at ten years; in California no person under the age of fourteen is regarded as criminally responsible.

[16] Reg. vs. Smith, 1 Cox C. C., 260; Martin vs. State, 90 Ala., 602; People vs. Townsend, 3 Hill (N. Y.), 479.

one day over seven." But at every age between seven years and fourteen years there is a prima facie presumption of a lack of criminal capacity which must be overcome by proof.[17] This proof may be found in the circumstances attending the commission of the crime charged, or the evidence may be entirely outside of the details of the crime for which the infant is on trial. In every case in which an infant between seven and fourteen years of age is on trial for a criminal offense, the question of criminal capacity must be presented to and tried by the jury as a distinct issue, and not to do this is ground for reversing a conviction.[18] Above the age of fourteen there is a prima facie presumption that every person is generally criminally responsible.[19]

INSANE PERSONS.

Insanity is the general legal term which includes mania, dementia, idiocy, delusions, and every form of mental disease or incapacity which prevents a person from understanding the nature of the act in question and its possible consequences.

Insanity as a defense to a criminal accusation is one of the most interesting and at the same time difficult topics of the criminal law. The law on this subject is still in a transition state, and some of the States are far in advance of others in defining what kinds and degrees of insanity shall be considered a sufficient defense and what degree of proof is re-

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[17] State vs. Tice, 90 Mo., 112; Com. vs. Mead, 10 Allen (Mass.), 398; Angelo vs. People, 96 Ill., 209; State vs. Adams, 76 Mo., 355; 4 Am. Cr., 392.

[18] Angelo vs. People, 96 Ill., 209; State vs. Barton, 71 Mo., 288; State vs. Fowler, 52 Iowa, 103.

[19] After the age of fourteen the burden is upon defendant to show want of capacity. Irby vs. State, 32 Ga., 496; Law vs. Com., 75 Va., 885.

quisite to establish it. It may, however, safely be said that the most backward of American courts is far in advance of the harsh and unenlightened doctrines of the common law upon this subject. In the discussion of the subject we shall proceed step by step, showing how far all the courts go, and then showing to what extent the latest decisions have gone.

It is universally agreed that when one is insane to that degree that he is mentally incapable of distinguishing between right and wrong generally, and, also, when he is insane to that degree that he does not know that the particular act in question is wrong, he is not criminally responsible for the act.

The first branch of the proposition necessarily includes the second, since a general incapacity to distinguish between right and wrong necessarily involves an incapacity to distinguish between right and wrong in any particular case. But in order to simplify the issue, the question which is ordinarily considered, is whether or not the defendant had sufficient mental capacity to know that the particular act in question was wrong. The mere fact that a person accused of crime is a lunatic or an insane person is not regarded by any court as a defense to a criminal charge. And, therefore, where a trial judge was requested to instruct a jury that if they should find that the defendant was a lunatic or insane at the time he committed the act for which he was on trial, they should acquit him, it was held in a recent and well considered case, that this request was properly modified so as to instruct the jury that if "the defendant, at the time of committing the act, was a lunatic or insane, to the extent of obliterating the sense of right or wrong as to the

particular act done," he was not criminally responsible for the act in question.[20] And so in McNaghten's case[21] it was the opinion of the English judges that "to establish a defense on the ground of insanity it must be clearly proved that at the time the act was committed, the accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature or quality of the act he was doing, or if he did know it, that he did not know he was doing wrong."[22] And in 1844, Ch. J. Shaw, of Massachusetts, a very great judge, stated the law as follows: "A man is not to be excused from responsibility if he has capacity and reason sufficient to enable him to distinguish between right and wrong as to the particular act he is then doing. A knowledge and consciousness that the act he is doing is wrong and criminal will subject him to punishment."[23]

It will be observed that this view of the law entirely ignores the question of the power of the will of an insane person to resist the impulse to do a criminal act (which he knows is wrong). Upon this point there is abundance of authority for the next proposition.

Insanity, or mental disease, which renders one incapable of resisting the temptation to commit a crime is a sufficient defense, even though the accused knew that he was doing wrong.

Upon this proposition Mr. Wharton speaks as follows: "If there be either incapacity to distinguish

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[20] Hornish vs. People, 142 Ill., 620.

[21] 10 Clark and F. 200.

[22] See also Hornish vs. People, 142 Ill., 620; Blackburn vs. State, 23 Ohio St., 146; Flannagan vs. People, 52 N. Y., 467; Brown vs. Com., 78 Pa. St., 122; U. S. vs. Faulkner, 35 Fed. Rep., 730; State vs. Harrison, 9 Am. Cr., 626.

[23] Com. vs. Rogers, 7 Metc. (Mass.), 500.

between right and wrong as to the particular act, or delusion as to the act, or inability to refrain from doing the act, there is no responsibility."[24] "If," said Jude Dillon, "by the observation and concurrent testimony of medical men who make the study of insanity a specialty, it shall be definitely established to be true that there is an unsound condition of the mind, in which, though a person abstractly knows that a given act is wrong, he is yet, by an insane impulse, that is an impulse proceeding from a diseased intellect, irresistibly driven to commit it, the law must modify its ancient doctrines, and recognize the truth, and give to this condition, when it is satisfactorily shown to exist, its exculpatory effect."[25] In another case the following language was used: "Men, under the influence of disease, may know the right and yet be powerless to resist the wrong. The well known exhibition of cunning by persons admitted to be insane, in the perpetration of an illegal act, would seem to indicate comprehension of its evil nature and legal consequences, and yet, the power of self-control being lost from disease, there can be no legal responsibility."[26]

INSANE DELUSIONS.

Another form of insanity frequently interposed as a defense to a criminal accusation is an insane delusion. Upon this subject the law has been generally held to be as it was stated by the English judges. The law may be formulated as follows:

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[24] 1 Whart. Cr. Law (9th Ed.), Sec. 33.

[25] State vs. Felter, 25 Iowa, 68.

[26] Bradley vs. State, 31 Ind., 492. See also opinion of Somerville, J., in Parsons vs. State, 81 Ala., 577, a most masterly discussion in which all the important cases are collected and cited. (S. C. 7 Am. Cr., 266); Dunn vs. People, 109 Ill., 635; 4 Am. Cr., 52.

The act of a person who is subject to and controlled by an insane delusion is to be judged as though the fact which, under the influence of mental disease, he believes to be true, were true in fact. If the fact which he believes to be true, would absolve a sane man if it were true in fact, it will excuse the victim of the delusion, otherwise it will not excuse him.

What is an insane delusion was well defined by Judge Cox in Guiteau's case,[27] and the definition there given has been generally approved. In that case an insane delusion was defined as follows: "An insane delusion, according to all testimony, seems to be an unreasoning and incorrigible belief in the existence of facts which are either impossible absolutely, or, at least, impossible under the circumstances of the individual case. A man, with no reason for it, believes that another is attempting his life, or that he himself is the owner of untold wealth, or that he has invented something which will revolutionize the world, or that he is president of the United States, or that he is God, or Christ, or that he is dead, or that he is immortal, or that he has a glass arm, or that he is pursued by enemies, or that he is inspired by God to do something.

In most cases, as I understand it, the fact believed is something affecting the senses. It may also concern the relations of the party with others. But generally the delusion centers around himself, his cares, sufferings, rights and wrongs. It comes and goes independently of the exercise of will and reason, like the phantasms of dreams. It is, in fact, the waking dream of the insane, in which facts present them-

[27] 10 Fed. Rep., 161; State vs. Lewis, 20 Nev., 333.

selves to the mind as real, just as objects do to the distempered vision in delirium tremens.

The important thing is that an insane delusion is never the result of reasoning and reflection. It is not generated by them, and it cannot be dispelled by them."

Recurring now to the particular doctrine involved in this discussion we proceed to the authorities on which it rests. In McNaghten's case (Supra Cit.) to the question: "If a person, under an insane delusion as to existing facts, commits an offense in consequence thereof, is he thereby excused?" the English judges answered: "In case he labors under a partial delusion only, and is not in other respects insane, he must be considered in the same situation, as to responsibility, as if the facts with regard to which the delusion exists were real. For example, if under the influence of his delusion he supposes another man to be in the act of attempting his life, and he kills that man, as he supposes, in self-defense, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury on his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment."[28]

This is putting the victim of an insane delusion upon the same footing as a sane man as to everything except the delusion. For, as we shall see hereafter, it is lawful for a sane man to kill another for the purpose of self-defense, if under the circumstances of the particular case it reasonably appears to him to be necessary to take life in order to preserve his own

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[28] See also Com. vs. Rogers, 7 Metc. (Mass.), 500; People vs. Taylor, 138 N. Y., 398; Bolling vs. State, 54 Ark., 588; Thurman vs. State, 32 Neb., 224.

life or to save himself from great bodily harm, whether such necessity is real or only apparent. But taking life in revenge for an injury is never justified or excused by law.

It is hardly to be wondered at that the doctrine by which the victim of an insane delusion is treated as a man who is sane except that he is, as to his insane delusion regarded as laboring under an honest and excusable mistake of fact, has been vigorously attacked by eminent specialists on the subject of insanity.[29]

And so, also, many of the courts have practically discarded the doctrine. The doctrine of some of the best reasoned modern cases is expressed in broad and general terms as follows:

If the accused, at the time of committing the alleged criminal act, was insane, or mentally diseased, and the act under investigation was the product, or offspring, of that insanity, or mental disease, or, in other words, if the act would not have been committed, but for the existence of that insanity, or mental disease, the accused cannot be held criminally responsible for the act.

This is the rule laid down by the Supreme Courts of New Hampshire and Alabama in decisions which review all the authorities.[30] In the Alabama case the conviction was reversed because the trial court refused to instruct the jury, as requested by respondent's counsel in these words. "If the prisoners com-

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[29] Browne Insan., Sec. 13 et seq.; Ray Med. Jurisprudence, Secs. 16-19; Wharton & S. Med. Jur., Sec. 159.

[30] State vs. Pike, 49 N. H., 399; State vs. Jones, 50 N. H., 369; Parsons vs. State, 81 Ala., 577. Kleptomania has been recognized as an admitted form of insanity. Harris vs. State, 18 Tex. App., 287; 5 Am. Cr., 357.

mitted the act in a manner which would be criminal and unlawful, if they were sane, the verdict should be not guilty, if the killing was an offspring, or product, of mental disease in the prisoners." In the opinion of the authors, these cases lay down the correct rule but it cannot be said as yet that this doctrine prevails in all the courts. And in the Alabama case, Stone, J., one of the greatest jurists of this century delivered a very able dissenting opinion.

AMOUNT OF EVIDENCE REQUIRED TO ESTABLISH INSANITY AS A DEFENSE TO A CHARGE OF CRIME.

Sanity or mental soundness is the normal condition of mankind. It is, therefore, the rule that every person accused of crime is presumed to be of sound mind until there is some evidence to the contrary. This evidence may be found in the circumstances attending the commission of the crime for which the accused is on trial, or it may be in the appearance and demeanor of the prisoner at the trial, or independent evidence may be given in support of the defense of insanity.

The authorities are not agreed upon the question as to what degree of proof of insanity shall be sufficient to warrant an acquittal upon this ground. In New Jersey it has been held that it is necessary to prove the insanity of the prisoner beyond a reasonable doubt.[31] In other jurisdictions it would seem to be the rule that where any evidence has been given tending to establish the insanity of the accused, the burden is upon the State to prove his sanity beyond

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[31] State vs. Spencer, 1 Zab. (21 N. J. Law), 202.

a reasonable doubt.[32] But the clear weight of modern authority is in favor of the following rule:

When insanity is set up as a defense in a criminal case, it must be established by a preponderance of evidence, and a reasonable doubt of the defendant's sanity, raised by all the evidence, does not authorize an acquittal.[33]

In conclusion, it may be added that an insane person cannot be tried while he is insane, nor can he be sentenced if he has been convicted until he has regained control of his faculties.[34]

MARRIED WOMEN.

At the common law there is a prima facie presumption in favor of a married woman that certain criminal acts done by her in her husband's presence are done as the result of his coercion, on account of which the law holds her excused.

The ground upon which the married woman is excused is that the criminal act is not her free and voluntary act, but that she does it under coercion or duress, a ground of defense to criminal accusations which has been already adverted to. A married woman is not excused for committing a crime in the presence and even at the instigation of her husband,

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[32] People vs. Garbutt, 17 Mich., 9; State vs. Mixon, 32 Kan., 205; 5 Am. Cr., 307.

[33] Parsons vs. State, 81 Ala., 577; Lynch vs. Com., 77 Pa. St., 205; People vs. Best, 39 Cal., 690; State vs. Lawrence, 57 Me., 574; State vs. Potts, 100 N. C., 457; Com. vs. Rogers, 7 Metcf. (Mass.), 500; contra Langdon vs. People, 133 Ill., 382; State vs. Lewis, 8 Am. Cr., 574; Coates vs. State, 50 Ark., 330; 7 Am. Cr., 585.

[34] Deaf mutes incapable of understanding the proceedings in a trial are classed with insane persons. Queen vs. Berry, 3 Am. Cr., 428.

or jointly with him, unless she is actually coerced by him. The law, therefore, should be stated as follows:

A married woman who commits a crime in the presence and under the coercion of her husband is not criminally responsible for the act, and when the act is committed in the presence of the husband there is a prima facie presumption that it is done under his coercion.

As stated, the presumption is merely a prima facie presumption; that is, it is a disputable and not a conclusive presumption. It is rather a weak than a strong presumption, and may be overcome by the circumstances attending the commission of the crime, as, for instance, when the evidence tends to show that the wife took a leading and active part.[35] But where the evidence shows and the jury finds that the act was done in the presence and under the coercion of the husband, the wife is not criminally punishable.[36] And the mere fact that the wife is the more active of the two, where husband and wife commit a crime jointly, is not conclusive as to her guilt, for notwithstanding this her participation may not have been a voluntary one.[37] In a recent Massachusetts case the general doctrine was well stated as follows:

"When a married woman is indicted for a crime, and it is contended in defense that she ought to be acquitted because she acted under the coercion of her husband, the question of fact to be determined is whether she really and in truth acted under such

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[35] People vs. Wright, 38 Mich., 744; Miller vs. State, 25 Wis., 384; State vs. Cleaves, 59 Me., 302; Blakeslee vs. Tyler, 55 Conn., 397.

[36] Com. vs. Neal, 10 Mass., 152; Davis vs. State, 15 Ohio, 72.

[37] State vs. Houston, 29 S. C., 108.

coercion, or whether she acted of her own free will and independently of any coercion or control by him. To aid in determining this question of fact, the law holds that there is a presumption of such coercion from his presence at the time of the commission of the crime. This presumption, however, is not conclusive and it may be rebutted; and in order to raise this presumption, it is also established that the husband's presence need not be at the very spot, or in the same room, but it is sufficient if he was near enough for her to be under his immediate control or influence."[38]

The rule in favor of married women can only be applied where the act is done in the presence of the husband as this phrase has been explained. "For," says Mr. Bishop, "surely a wife out of her husband's presence is sufficiently free from his influence to be answerable for whatever of crime she does."[39] But when a woman, at the command of her husband, who was in prison, procured an implement of escape and brought it to him in prison, she was excused because the act was completed in his presence.[40]

It is generally said that the exemption from criminal punishment of a married woman does not extend to treason and murder[41] because, as it is said, of the special atrocity of these crimes. But this reasoning, as Mr. Bishop points out, does not appear to be very satisfactory, and in Iowa the presumption and exemption are allowed to married women even in murder cases.[42] It has also been allowed in cases of bur-

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[38] Com. vs. Daley, 148 Mass., 11.
[39] See Com. vs. Murphy, 2 Gray, 510.
[40] Note to Rex vs. Knight, 1 Car. & P., 116.
[41] Davis vs. State, 15 Ohio, 72.
[42] State vs. Kelly, 74 Iowa, 489.

glary[43] and robbery.[44] And in Arkansas, by statute, a woman is not punishable for any crime whatever, "if it appear from all the facts and circumstances of the case" that she acted "under the threats, commands, or coercion of her husband."[45]

It is generally said that there is no presumption that a married woman is acting under the coercion of her husband, where she is charged with keeping a house of prostitution or other kind of disorderly house. This proceeds upon the general experience of mankind that the wife ordinarily manages and controls the household, and therefore, prima facie, she is individually responsible for her own acts and conduct in matters involving the control and management of the house.[46]

Lastly, upon this subject, it is to be remarked, that a married woman cannot be guilty of being an accessory after the fact to her husband's crime, nor of receiving stolen property from her husband,[47] which is a statutory crime of the same general character. What an accessory after the fact is, is fully explained in the next chapter. The ground upon which this doctrine rests is that on account of the marital relation the wife always owes a duty to succor, assist and protect her husband, and this wifely loyalty is allowed as an excuse for neglecting the duty which

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[43] State vs. Bell, 29 Iowa, 316.

[44] Reg. vs. Dykes, 15 Cox C. C., 771; People vs. Wright, 38 Mich., 744; Miller vs. State, 25 Wis., 384; Com. vs. Daley, 148 Mass., 11. But see contra Bibb vs. State, 91 Ala., 431.

[45] Edwards vs. State, 27 Ark., 493.

[46] Rex vs. Dixon, 10 Mod., 335; Reg. vs. Williams, 10 Mod., 63; State vs. Bentz, 11 Mo., 27; Com. vs. Cheney, 114 Mass., 281.

[47] Reg. vs. Brooks, Dears. C. C., 184; 14 Eng. L. and Eq., 580.

rests upon citizens generally to deliver up a felon to the officers of justice.[48]

INTOXICATED PERSONS.

In a great number of adjudicated cases evidence has been offered that the respondent was intoxicated at the time of the commission of the crime for which he was on trial. Such evidence is always admissible. Upon the trial of any person charged with crime every fact which may throw any light upon the guilt, or the degree of guilt, of the accused may be laid before the jury, and under this general principle the question of the mental condition of the prisoner at the time of the commission of the act, may always be inquired into, because it bears upon the question of his intent. Evidence as to intoxication is admitted because it may shed some light upon the intent with which the alleged criminal act was committed. What force or effect is to be given to the fact of intoxication, when it is proven, depends upon what light it sheds on the question of intent. While in some cases intoxication of the accused at the time of the commission of the crime may be a factor in determining the question of guilt, it must always be remembered that this is the exception and not the rule. The general rule as to intoxication may be stated in these words:

Voluntary intoxication is no defense to crime, and does not lessen, palliate, or extenuate its guilt.[49]

This general proposition rests upon elementary and

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[48] Reg. vs. Manning, 2 Car. & K., 887, 903.

[49] Warner vs. State, 9 Am. Cr., 526; and it is said that temporary insanity induced by voluntary intoxication is no defense. Upstone vs. People, 109 Ill., 169; 4 Am. Cr., 395.

fundamental legal principles. It is wrong for a man to get drunk, although mere private drunkenness is not an indictable offense at the common law. It is otherwise with public and disorderly drunkenness. But the ordinary effects of intoxication are well understood. It blunts the perceptive and reasoning faculties of the mind, it deadens the conscience, it stimulates the passions, and makes a man less regardful of the duties which he owes to himself, to his family, and to the public. To permit a man to urge in his defense to a criminal accusation that he would not have done the deed if he had not voluntarily divested himself of the safeguards with which reason and conscience protect a sober man from temptation, would be to allow a man to interpose his own wrong-doing as a shield against the consequences of his acts. The ancient maxims of the common law teach us on the contrary that "no man shall take advantage of his own wrong," nor shall any man be heard in court to allege his own turpitude. ("Allegans suam turpitudinem non est audiendus.") Although these are maxims most frequently applied in civil cases, they illustrate fundamental principles which equally pervade the criminal law. And there is an ancient maxim of the common law which directly applies to the matter now under consideration: "Qui peccat ebrius luat sobrius." "Who sins when he is drunk shall pay the penalty when he is sober." Therefore, it is said, that one who voluntarily clouds his reason, inflames his passion, and deadens the voice of conscience by the use of intoxicating liquors or drugs, gets no immunity thereby, but his acts are to be judged as though he were sober at the time of committing the crime for which he is on trial. This is the general principle which has been announced in hundreds of cases, a

few of the most important of which are cited below.[50]

Having thus stated the general doctrine, it now remains to see what apparent exceptions and modifications it has.

And, first, the student is to note that in what has been said the term "voluntary" intoxication has been used. A man may become involuntarily intoxicated; that is, without being himself at fault.[51] But it is said that if a party be made drunk by stratagem, or the fraud of another, or through the unskillfulness of his physician, he is not criminally responsible for what he does while in that condition.[52]

The only importance of the fact of drunkenness in a criminal trial, where it has any relevancy, is its bearing upon the question of intent. As we shall see hereafter, there are crimes in which the matter of the specific intent with which an act is done determines whether an act is criminal or not, and there are other criminal acts in which the intent determines the degree of the crime. Burglary is an instance of the first class, and assault with intent to commit murder is an instance of the second class.

Burglary consists in the breaking and entering of the dwelling house of another in the night time with intent to commit a felony therein. The mere breaking and entering of the dwelling house of another in the night time, without any criminal purpose, would not be a crime at all, but merely a civil trespass. Here the intent and purpose to commit a felony con-

[50] People vs. Rogers, 18 N. Y., 9; State vs. Tatro, 50 Vt., 483; 3 Am. Cr., 165; Burrow's case, 1 Lewin Crown Car., 75; U. S. vs. Drew, 5 Mason, 28; Rex. vs. Thomas, 7 Car. & P., 817; Kelley vs. State, 3 Smedes & M., 518; People vs. Garbutt, 17 Mich., 9; Rafferty vs. People, 66 Ill., 118; Pirtle vs. State, 9 Humph., 663; People vs. Slack, 90 Mich., 448.

[51] State vs. Brown, 8 Am. Cr., 165.

[52] Pearson's Case, 2 Lewin, 144; People vs. Robinson, 2 Parker C. C., 235; see Roberts vs. People, 19 Mich., 401.

verts what is otherwise a mere trespass into a felony of an atrocious character.

Now, if a drunken man breaks into the house of another in the night time, it will readily be seen that the question of his drunkenness, and the degree of his drunkenness, may be important factors in determining whether or not the breaking and entry were in order to accomplish a criminal or felonious purpose. And in a prosecution for larceny, which crime is not committed unless there is an intent to permanently deprive the owner of his property, it has been held to be a good defense that a man was too drunk to entertain this specific intent.[53] And for the same purpose evidence of drunkenness has been admitted in cases where knowingly passing counterfeit money was charged,[54] in cases of homicide to determine the degree of the crime,[55] and in many other cases. The general doctrine is well stated in this language: "But although drunkenness is clearly no excuse for the commission of any crime, yet proof of the fact of drunkenness may be very material, as tending to show the 'intention' with which the particular act charged as an offense was committed, and whether the act done was accidental or designed."[56]

CORPORATIONS.

A corporation being an artificial person endowed

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[53] Rex vs. Pitman, 2; Car. vs. P., 423; Com. vs. French, Thach. C. C., 163; Cline vs. State, 5 Am. Cr., 57.

[54] Pigman vs. State, 14 Ohio, 555.

[55] Haile vs. State, 11 Humph. (Tenn.), 154; Hopt vs. People, 104 U. S., 631; 4 Am. Cr., 365; Lancaster vs. State, 2 Lea (Tenn.), 375; 3 Am. Cr., 160.

[56] Broom Leg. Max., 17; Hopt vs. People, 104 U. S., 631 Reg. vs. Doherty, 16 Cox Cr. Cas., 306; Aszman vs. State, 123 Ind., 347; Bernhardt vs. State, 82 Wis., 23; People vs. Vincent, 95 Cal., 425; People vs. Langton, 67 Cal., 427; 7 Am. Cr., 439.

by law with certain attributes and powers, its liability under the criminal law must necessarily be limited by the nature of its duties and powers. It is an impersonal being, and cannot be guilty of those offenses which are made criminal by reason of the personal malice which accompanies the act. Thus it cannot be guilty of assaults, malicious mischiefs, etc., or of any felony.[57]

As a general rule, however, corporations are criminally liable for the failure to perform those duties imposed upon it by its charter or other laws, the same as an individual would be liable for the breach of a similar duty.[58]

While the authorities are agreed that a corporation may be indicted for a non-feasance, they disagree as to its criminal liability for a misfeasance. Some of the courts hold that a corporation may be indicted for a breach of duty, whether it consists in a wrongful act or of a wrongful omission.

Thus, in a case in which a corporation was indicted for obstructing a navigable stream, the court held as follows: "Corporations cannot be indicted for offenses deriving their criminal quality from evil intent, or which consist of a violation of those duties which appertain to men or subjects. They cannot be guilty of treason, felony, perjury or offenses against the person.

"But beyond this, there is no good reason for their exception from the consequences of unlawful and

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[57] Orr vs. Bank of U. S., 1 Ohio, 36; Bishop on Criminal Law, Sec. 422.

[58] People vs. Albany, 11 Wend., 539; New York & G. L. R. Co. vs. State, 53 N. J. Law, 444.

wrongful acts committed by their agents in pursuance of authority derived from them."[59]

This seems to be the better rule, but many courts have held the contrary.[60]

Other States have held that corporations might be indicted for maintaining a nuisance, but not for other misfeasances.[61]

While a corporation is indictable for a wrong, its punishment can only be by way of fine, and in those cases in which a corporation cannot be indicted, the officers or agents participating in the wrongful acts may be criminally responsible.[62]

CRIMINAL INTENT.

In the discussion of the question of what constitutes a criminal intent, it is important to have a clear understanding of what is meant by intent. It is not to be confounded with motive or purpose. With the best motives in the world, one may commit a criminal act, with a criminal intent, and yet be innocent of any purpose either to do wrong or to violate the law.[63] By intent, in certain classes of cases, is meant the state or condition of the mind with regard to the facts which surround the act which is de-

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[59] Com. vs. Proprietor New Bedford Bridge, 2 Gray, Mass., 339. See also State vs Morris & Essex Ry., 3 Zab., 360; State vs. Vermont Central Ry., 27 Vt., 103, 30 Vt., 108; Louisville & Nashville Ry. Co. vs. State, 3 Head, 523.

[60] State vs. The Great Works Milling Co., 20 Maine, 41; Com. vs. Swift Turnpike Co., 2 Va. Cases, 362; see State vs. Ohio & Mississippi Ry. Co., 23 Ind., 362.

[61] Delaware Division Canal Co. vs. Com., 60 Penn. St., 367; Pelatka & I. R. Ry. Co. vs. State, 23 Fla., 546.

[62] State vs. Conlee, 25 Iowa, 237.

[63] Religious belief does not excuse or justify doing the act which the law forbids. Davis vs. Beason, 8 Am. Cr., 89.

nounced as a crime. This kind of criminal intent is defined as follows: —

An intent to do the act which the law denounces, having knowledge of the facts which make it a crime, is a criminal intent, without regard to the motive which prompts it, and whether or not the offender knows that what he is doing is wrong, or a violation of the law.

This doctrine as to criminal intent finds its source and strength in the ancient maxim: "Ignorantia juris neminem excusat." "Ignorance of the law excuses nobody." And another common law maxim declares, "Ignorantia facti excusat — ignorantia juris non excusat"; "ignorance of fact excuses — ignorance of the law does not excuse."

This doctrine with regard to ignorance of the law is deeply embedded in our law. A few illustrative cases will serve to show its scope. In a case in which a woman was charged with adultery, she offered to prove that she had been deserted by her husband, and that after the desertion her husband had married another woman, and that upon this state of facts she was advised by a justice of the peace, whom she consulted, that this freed her from her husband, and that she might lawfully marry again; that, acting on this advice, in good faith she did marry again. It was her cohabitation with this second husband which was the adultery charged. It was held that this was no defense.

In passing upon the case Peter, J., uses this language: "Ignorance of the law excuses no one. Be sure, this maxim, like all others, has its exceptions. None of the exceptions, however, can apply here. The law, which the respondents are conclusively presumed to have known, as applicable to their case, is

well settled and free from all obscurity or doubt. It would perhaps, be more exact to say, they are bound as if they knew the law. * * * The rule, though productive of hardships in particular cases, is a sound and salutary maxim of the law. Then, the respondents say, they were misled by the advice of the magistrate of whom they took counsel concerning their marital relations. But the gross ignorance of the magistrate cannot excuse them. They were guilty of negligence and fault to take his advice. They were bound to know and ascertain the law and facts for themselves, at their peril. A sufficient criminal intent is conclusively presumed against them in their failure to do so."[64]

So, in another case, where the well-known Susan B. Anthony was prosecuted for voting illegally, Miss Anthony claiming that she had a constitutional right to vote, the court said: "Two principles apply here: First, ignorance of the law excuses no one; second, every person is presumed to understand and to intend the necessary effects of his own acts. Miss Anthony knew that she was a woman, and that the constitution of this state prohibits her from voting. She intended to violate that provision — intended to test it, perhaps, but certainly intended to violate it. The necessary effect of her act was to violate it, and this she is presumed to have intended. There was no ignorance of any fact, but, all the facts being known, she undertook to settle a principle in her own person. She takes the risk and she cannot escape the consequences. It is said, and authorities are cited to sustain the position, that there can be no crime unless

[64] State vs. Goodenow, 65 Me., 30; (s. c. 1 Am. Cr., 42). See also Com. vs. Goodman, 97 Mass., 117; Com. vs. Emmons, 98 Mass., 6; McGuire vs. State, 7 Humph., 54; Reynolds vs. U. S., 98 U. S., 145; Miles vs. U. S., 103 U. S., 304.

there is a culpable intent, and that to render one criminally responsible, a vicious will must be present. A commits a trespass on the land of B, and B, thinking and believing that he has a right to shoot an intruder upon his premises, kills A on the spot. Does B's misapprehension of his rights justify his act? Would a judge be justified in charging the jury that, if B supposed he had a right to shoot A, he was justified and they should find a verdict of not guilty? No judge would make such a charge. To constitute a crime it is true that there must be a criminal intent, but it is equally true that knowledge of the facts of the case is always held to supply this intent."[65]

The principle under discussion is carried so far that a man was held to be lawfully convicted of violating a statute, although at the time the statute was passed, and up to the time the act was committed, he was in a ship at sea and could not possibly have known of the enactment of the statute.[66]

And the rule, that every one is presumed to know the law, applied as well to foreigners as to native-born citizens. It was said in State vs. Goodenow (supra), that the maxim that ignorance of the law does not excuse has, like all other maxims, its exceptions. This appears to be true, but it is difficult to discern any clear principle upon which these exceptions rest. They seem to be chiefly cases in which, owing to ignorance of law, a mistaken view as to rights of property has been entertained. Thus it has been held that in a prosecution for larceny, an honest belief on the part of the accused that the property taken was his own, was a good defense even though

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[65] U. S. vs. Anthony, 11 Blatchf., 200; Rex vs. Bailey, Russ. & R., 1; The Ann., 1 Gallis, 62.

[66] Rex vs. Esop, 7 Car. & P., 456; Barronet's Case, 1 El. & Bl., 1.

this is a mistaken belief and grew out of a misapprehension of the law.[67]

And the same rule has been applied in other cases where there was an honest mistake as to the ownership of property, although the mistake grew out of ignorance of the law.[68]

And generally it may be said that where an act must be done with a certain evil intent in order to be a crime, it is permissible to show that owing to a mistake as to the law that particular intent did not exist.[69] There are two different and entirely distinct states of the mind in which a criminal intent is attributed by law. The one depends upon a knowledge of facts without regard to a consciousness of wrong-doing. In this state of mind it is immaterial whether or not there is any consciousness of wrong-doing. The other state of mind in which a criminal intent is attributed depends upon a consciousness of wrong-doing, without regard to a knowledge of the facts of the particular case. In this state of mind it is immaterial whether or not the accused knows of the facts which subject his act to legal punishment.

MISTAKE OF FACTS; WHEN IT EXCUSES.

Having examined the doctrine that ignorance of the law is no defense where an act punishable by law is done with a full knowledge of the facts, we may

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[67] Rex vs. Hall, 3 Car. & P., 409; Com. vs. Doane, 1 Cush., 5; State vs. Holmes, 17 Mo., 379.

[68] Reg. vs. Langford, Car. & M., 602; Goforth vs. State, 8 Humph., 37; Dye vs. Com., 7 Gratt, 662; Rex vs. Hall, 3 Car. & P., 409; Com. vs. Stebbins, 8 Gray, 495; The People vs. Husband, 36 Mich., 306; The People vs. Schultz, 71 Mich., 315.

[69] Reg. vs. Irvose, 15 Cox C. C., 327; U. S. vs. Connor (a perjury case), 3 McLean, 573; Rex vs. Chope, 7 Car. & P., 720; State vs. McDonald, 4 Harr., 555; Com. vs. Shedd, 1 Mass., 227; State vs. Porter, 2 Tread., 694.

now inquire briefly when a mistake of fact will relieve from the guilt of an act otherwise criminal. The rule on this question may be stated as follows:

When one does an act under mistake of fact, and the mistake is not attributable to his own fault or negligence, his act is not criminal, if he would have been blameless, if the facts had been as he honestly and reasonably believed them to be.

This doctrine is frequently applied in cases of homicide where the accused claims to have acted in self-defense. As will be seen in our discussion of the law of homicide, it is permissible to take life where it is necessary to protect one's own life or to save himself from grievous bodily harm. In all cases of this nature the accused is to be judged according to the facts as they reasonably appeared to him at the time, and although it may appear afterwards that he was in no danger, yet if at the time he reasonably believed that he was in danger of his life or serious bodily harm he is guiltless.[70] It is admissible to kill in order to prevent the commission of an atrocious crime, and, therefore, when one killed an innocent person, justifiably believing that he was a burglar, it was held that he must be acquitted.[71] One who was indicted for illegal voting because he was not of legal age was held excused because he reasonably and honestly believed he was more than twenty-one years old.[72]

There are some classes of cases as to which the courts are not agreed whether or not they come within the principle now under discussion. Bigamy is one of them. In the statutes against bigamy it is

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[70] See infra, under title Homicide.
[71] Levet's case, 1 Hale, P. C., 474.
[72] Gordon vs. State, 52 Ala., 308.

provided that when husband or wife shall have been absent and not heard of for seven years, the one left shall not be guilty of bigamy in marrying again even though it may turn out that the absent spouse was living at the time of the second marriage. The courts are not agreed whether a bona-fide belief, founded on reasonable grounds, of the death of an absent husband or wife is a good defense to a bigamous marriage contracted within the seven years. In a late English case, which turns upon this point, a majority (eight) of the judges were of opinion that it was a good defense, while the minority (five) thought it was no defense.[73] In a Massachusetts case the court seemed to be of opinion that such a defense is not a good defense, but it can hardly be said that the precise point arose in that case, for there seems to have been no evidence on which a belief of the death of the absent spouse could have been founded, except unexplained absence for less than the statutory seven years.[74]

Generally speaking, the courts are agreed that it is no defense to a prosecution for violating statutes against the sale of adulterated articles of food, that the accused did not know they were adulterated. This proceeds upon the ground that it is the duty of the seller to know whether or not the article he sells is pure or adulterated and it is his own fault if he does not.[75]

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[73] Queen vs. Tolson, 23 Q. B. Div., 168.

[74] Com. vs. Mash., 7 Metc., 472.

[75] Com. vs. Farren, 9 Allen, 489; Com. vs. Boynton, 2 Allen (Mass.), 160; People vs. Roley, 52 Mich., 577.

"There are many statutes which are in the nature of police regulations, which impose criminal penalties, irrespective of any intent to violate them; the purpose being to require a degree of diligence for the protection of the public, which shall render violation impossible. Thus, in Massachusetts, a person may be convicted of the crime of

Under statutes forbidding the sale of liquors to minors, some courts hold that it is no defense that the seller reasonably and honestly believed that the minor was of full age,[76] while other courts hold the contrary.[77]

While it does not appear, from an examination of the decisions in the cases cited to the last paragraph, that the judges were consciously moved by their personal feeling toward the liquor traffic, it can hardly be doubted that the difference in opinion is to some extent referable thereto. For, if there is nothing blameworthy, or to be discountenanced by the courts in an act which would have been innocent if the facts

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selling intoxicating liquor as a beverage, though he did not know it to be intoxicating. Com. vs. Boynton, 2 Allen, 160. And the offense of selling adulterated milk, though he was ignorant of its being adulterated. Com. vs. Farren, 9 Allen, 489; Com. vs. Holbrook, 10 Allen, 200; Com. vs. Waite, 11 Allen, 264; Com. vs. Smith, 103 Mass., 444. See State vs. Smith, 10 R. I., 258.

In Missouri a magistrate may be liable to the penalty for performing the marriage ceremony for minors without the consent of parents or guardians, though he may suppose them to be of proper age. Beckham vs. Nacke, 56 Mo., 546.

Where the killing and sale of a calf under a specified age is prohibited, there may be a conviction, though the party was ignorant of the animal's age. Com. vs. Raymond, 97 Mass., 567. See King vs. Dixon, 3 M. & S., 11.

In State vs. Steamboat Co., 13 Md., 181, a common carrier was held liable to statutory penalty for transporting a slave on its steamboat, though the persons in charge of its business had no knowledge of the fact. A case determined on the same principle is Queen vs. Bishop, 5 Q. B. Div., 259.

In Connecticut it has been held no defense in a prosecution for selling intoxicating liquor to a common drunkard, that the seller did not know him to be such. Barnes vs. State, 19 Conn., 398."

[76] State vs. Hartfiel, 24 Wis., 60; Farmer vs. People, 77 Ill., 322; Com. vs. Stevens, 155 Mass., 291.

[77] Crabtree vs. State, 30 Ohio St., 382; Faulks vs. People, 39 Mich., 200; but see People vs. Roley, 52 Mich., 577.

had been as they were believed to be, the act is ordinarily not punishable. But as we are about to see, this principle applies only where there is nothing in the act itself worthy of censure or which should be discountenanced. The kind of criminal intent which we are next to discuss is defined as follows: —

An intent to do something which is wrong in itself, is a criminal intent, although, if the facts had been as they were believed to be, the act would not have been criminally punishable.

In other words, ignorance of fact is never a defense to a criminal charge, where the act charged as a crime is wrong in itself. Our law writers divide wrongful acts into two general classes: Mala in se, or things which are essentially and in their nature wrong; and mala prohibita, things which are in their nature indifferent, but are wrong because they are prohibited by law. There are many acts which are wrongful in their nature, but are not punishable by law until they attain a certain degree of aggravation or magnitude. In cases of this character it is universally held that ignorance of the existence of the aggravating facts is no defense. This doctrine is well illustrated by an Iowa case. The defendant was prosecuted under a statute punishing the enticing away of an unmarried female under the age of fifteen years for the purpose of prostitution. He offered to defend himself by showing that he believed the girl to be over fifteen years, but the defense was held inadmissible. The court said: "In the case at bar, if defendant enticed the female away for the purpose of defilement or prostitution, there existed a criminal or wrongful intent, even though she was over the age of fifteen. The testimony offered was therefore irrelevant, for the only effect of it would have been to show that he intended one wrong and by mistake

committed another. The wrongful intent to do one wrong is only transposed to the other. And though the wrong intended is not indictable, the defendant would still be liable if the wrong done is so."[78] And the same principle is applied in cases of rape where there has been voluntary sexual intercourse with young girls who are under the statutory age of consent.[79]

This discussion is probably a sufficient consideration of the doctrine that intentionally doing an injurious or immoral act makes one criminally guilty, even though he believed the facts did not exist which bring the act within the pale of the law. We now proceed to a consideration of another doctrine as to criminal intent which rests upon the same general principles. It may be formulated as follows: —

Where one attempts to commit one crime and through accident, or mistake, or ignorance of the fact, commits another, he has such a criminal intent as makes him guilty of the latter crime.

This is a very ancient doctrine of our law. Lord Bacon said: "All crimes have their conception in a corrupt intent, and have their consummation and issuing in some particular fact, which, though it be not the fact at which the intention of the malefactor levelled, yet the law giveth him no advantage of the error if another particular fact ensue of as high a nature."[80] It will be observed that Lord Bacon limits the operation of the doctrine to cases where the intended crime was of as high a grade as the one

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[78] Reg. vs. Prince, 1 Am. Cr., 1; State vs. Johnson, 9 Am. Cr., 7; State vs. Ruhl, 8 Iowa, 447; People vs. Dolan, 96 Cal., 315; State vs. Johnson, 22 S. W. Rep., 463; Contra Mason vs. State, 29 Tex. App., 24.

[79] State vs. Houx, 109 Mo., 654; see also State vs. Handie, 47 Iowa, 647.

[80] Bacon's Maxims, Reg., 7.

actually committed. We shall discuss this thought more particularly after first illustrating the general scope of the rule. When a person intends to kill one person and accidentally kills another, he is guilty of murder of the latter.[81] Where a man assaulted a woman with intent to commit a rape and she gave him money to desist, he was held to be guilty of robbery.[82] And where one, attempting to commit robbery, unintentionally kills his victim, he is guilty of murder.[83] And where a man was trying to commit suicide, and accidentally killed one who was attempting to restrain him, he was held to be guilty of murder.[84]

These are all cases in which the original intent was to commit a felony, but not the felony which was actually committed. They all fall, therefore, within the principle as it is stated by Lord Bacon. In all these cases, also, there was an intent to do an act which was malum in se and not merely malum prohibitum. And upon this point it is said that an intent to do something which is merely malum prohibitum and not wrong in itself, is not a criminal intent which will make an accidental result criminally punishable.[85] And the doctrine under consideration is further illustrated by Mr. Bishop in this way: If one shoots at the fowls of another, intending to steal

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[81] Wynn vs. State, 63 Miss., 260; State vs. Gilmore, 98 Mo., 135; Angell vs. State, 36 Tex., 542; Golliher vs. Com., 2 Dew. (Ky.), 163; Clarke vs. State, 78 Ala., 474; 6 Am. Cr., 525.

[82] Rex vs. Blackham, 2 East P. C., 711; State vs. Barrett, 40 Minn., 77.

[83] Com. vs. Mink, 123 Mass., 422; State vs. Levelle, 34 S. C., 120.

[84] Reg. vs. Franklin, 15 Cox. C. C., 153.

[85] Where one drove his horse at a rate of speed greater than that allowed by a city ordinance, but not recklessly he is not guilty of an assault and battery. Com. vs. Adams, 114 Mass., 323; Estell vs. State, 51 N. J. L., 182.

them, and accidentally kills a man, he is guilty of murder, for he intended to commit a felony. But if he shoots at the fowls, not intending to steal them, this is a mere civil trespass, and accidentally killing a man would not be murder, but inasmuch as the act of shooting at the fowls of another is malum in se, the accidental killing would be manslaughter.[86]

The intent now under discussion is called by some writers "constructive intent," an unfortunate phrase, because, being based upon an erroneous theory, it tends to confuse the mind of the student. The theory on which it is based is that where the law attributes to a man the guilt of a particular crime, it attributes to him an intent to commit that particular crime; or, in other words, he cannot be convicted of the particular crime unless he intended to commit it. Now, as we have seen, a man may be guilty of a crime without having intended to commit that crime; it is, by the use of this phrase, intended to say that, "constructively," he intended to commit the crime, which actually he did not intend to commit; or, in other words, that the law attributes to him, or presumes he had, an intent which he did not have in fact. It is unnecessary to resort to any such legal sophistry in order to understand clearly the doctrine of criminal intent; and, as Erskine said about constructive treason, it is to be lamented that any such phrase should be allowed to creep into our law.

SPECIFIC INTENTS.

There are many crimes in which certain specific intents are necessary ingredients. For instance in larceny, there must be an absolute and specific intent to permanently deprive the owner of his property; in burglary there must be a specific intent to commit a

[86] East P. C., 225; I Bish. Cr. L. S., 415.

felony; in assault with intent to kill and murder, there must be a specific intent to kill a certain person under such circumstances that if death had resulted the crime would have been murder. All of these intents are discussed in connection with the particular crimes of which they are essential factors, and it is unnecessary to discuss them here further than to say that in any such case the crime is not committed unless the specific intent actually exists.[87]

We may notice here also a doctrine of intent which is fully discussed under the section devoted to attempts. It is the doctrine that when one does an act with the intent to commit a particular crime, he is not excused from the guilt of the attempt to commit it because by reason of facts of which he was ignorant the consummation of the crime was impossible in the particular case. On the other hand, doing an act, or attempting an act, which is supposed to be a crime, but is not, is not criminal. The maxim that everyone is supposed and bound to know the law operates in favor of, as well as against, those charged with crime.

ASSISTING OR PROMOTING THE COMMISSION OF A CRIME FOR THE PURPOSE OF BRINGING CRIMINALS TO JUSTICE.

Upon this topic courts have entertained widely different views. Some courts have apparently thought it was meritorious conduct to promote or abet the commission of a crime for the purpose of bringing criminals to justice, and have held that those acting in this way could not be said to have had a criminal intent, and therefore were not guilty of any crime. This class of cases is well illustrated

[87] M. Henry Roberts vs. People, 19 Mich., 401; Simpson vs. State, 59 Ala., 1; State vs. Gilman, 69 Me., 169.

in a prosecution for burglary. In that case there was evidence that the respondent, in company with two others, broke and entered the dwelling house of another in the night-time for the purpose of robbing him, but the respondent set up the defense that his only purpose in participating in the affair was to get evidence by which his associates could be convicted of the crime. The legal theory which was applied in this case was stated by the court in the following language: "The three persons who thus entered the house were the accused and his co-defendants, and it is conceded that the latter entered the house of Milroy, as stated, for the purpose of robbing him; but the plaintiff in error insists, and we think the evidence tends strongly to show the fact, that his object in accompanying them was to expose the contemplated crime, and bring the real perpetrators of it to justice, and whether this is so or not is really the only question in the case.

"The gist of the offense charged is the intent with which the plaintiff in error entered Milroy's house. The indictment charges it was with the intent to steal, and it is conceded the facts, as testified to by Milroy and his wife, are amply sufficient to make out a case against the accused, if there was no evidence explanatory of the criminating facts occurring at the house, and testified to by them, and it is therefore unnecessary to detail more particularly what transpired there. Judging the case by what occurred at Milroy's house alone, the plaintiff in error does not stand in any better position than his co-defendants, who are confessedly guilty, and have not therefore joined in the writ of error. The defense set up by the former is in the nature of a plea of confession and avoidance. If he was really, as he claims, acting the part of a mere detective in accompanying the other

two on their criminal mission, it is a matter of no significance that no difference could be seen in his conduct and the other two at Milroy's house, for to have acted his part well that would reasonably be expected. To have merely stood by as though he were a silent spectator would doubtless have excited the suspicions of his comrades, imperiled his own safety, and possibly have defeated the very object he claims to have had in becoming one of the party. The turning point in the case then is, is the evidence tending to show plaintiff in error was acting in the affair merely as a detective sufficiently strong to raise a clearly well-founded doubt of his guilt? If so, he ought not to be convicted."[88]

In another case it was held that one who joins a criminal organization for the purpose of exposing it and bringing criminals to punishment, and honestly carries out that design, is not an accessory before the fact, although he may have encouraged and counselled parties who were about to commit crime, if, in so doing, he intended that they should be discovered and punished.[89]

Other courts have denounced in strong language the conduct which to the courts who have just been quoted seemed commendable. In one case it was said: "The course pursued by the officers in this case was utterly indefensible. Where a person contemplating the commission of an offense approaches an officer of the law, and asks his assistance, it would seem to be the duty of the latter, according to the plainest principles of duty and justice, to decline to render such assistance, and to take such steps as would be likely to prevent the commission of the

[88] Price vs. People, 109 Ill., 109.

[89] Campbell vs. Com., 84 Pa. St., 187; Com. vs. Hallister, 27 At. Rep., 386.

offense, and tend to the elevation and improvement of the would-be criminal, rather than to his further debasement. Some courts have gone a great way in giving encouragement to detectives in some very questionable methods adopted by them to discover the guilt of criminals; but they have not yet gone so far, and I trust never will, as to lend aid or encouragement to officers who may, under a mistaken sense of duty, encourage and assist parties to commit crime in order that they may arrest and have them punished for so doing. The mere fact that the person contemplating the commission of a crime is supposed to be an old offender can be no excuse, much less a justification for the course adopted and pursued in this case."[90]

EFFECT OF CONSENT.

Nearly allied to the last topic is one branch of the discussion with regard to the effect of the consent of the injured party. There are many crimes where it is of the essence of the crime that the wrongful act should be against the will and without the consent of the injured party. Rape, robbery, arson, larceny and burglary belong to this class.

In these and crimes of like nature, the alleged criminal act must be without the consent of the party to be injured, and if there is in fact consent, the attempted crime cannot be and is not committed, even though the perpetrator is ignorant of the consent. This doctrine is referable to a principle which we have discussed elsewhere, that no one can be guilty of crime or criminal attempt where, as matter of law, it is impossible that a crime could be committed. Therefore, where a householder, for the pur-

[90] Marston, J., in Saunders vs. People, 38 Mich., 218; see also Connor vs. People, 18 Col., 373.

pose of entrapping thieves, directed his servant to open the house to them, no burglary was committed.[91] And the rule is the same where intending thieves are admitted by detectives acting in apparent collusion with them by the direction of their employers.[92] And where one consents to a plan that a confederate shall procure a third person to rob him in order to secure a reward, and the plan is carried out, this is no robbery.[93]

But there must be an actual consent. Merely neglecting to take precautions to prevent an anticipated crime,[94] or even leaving property exposed with the expectation of catching the thief, do not amount to consent nor rob the act of its criminal character.

There are some crimes, such as rape on girls under the age of consent, dangerous assaults, and blows given in prize-fighting, where consent is no defense.

The concurring guilt of the injured person, is no defense to a criminal accusation.[95]

It is of the essence of an act which the law punishes as a crime that it is in itself an injury to the State, in its nature and consequences, and the demoralization of society caused by its example. It is punished by the State because it is an injury to society at large, and not because it is injurious to an individual. For this reason the character or the con-

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[91] Connor vs. People, 18 Col., 373; Allen vs. State, 40 Ala., 334.

[92] Speiden vs. State, 3 Tex. App., 163; People vs. McCord, 76 Mich., 200.

[93] McDaniels' case, Fost. Crown Law, 121.

[94] People vs. Hanselman, 76 Cal., 400; State vs. Sneff, 22 Neb., 481.

[95] This proposition has been tersely and clearly expressed in these words: "In no case should crime be effectually interposed as a shield for crime." Champlin J., in People vs. Watson, 75 Mich., 582.

duct of the person who is the subject of the crime is of no consequence in the criminal law.

The equitable doctrine that he who comes into a court of equity must come with clean hands has no application in the criminal law.

Therefore, as will be seen from the discussion of the different crimes, it is as much larceny to steal stolen property from the thief as to steal property from its lawful owner;[96] as much rape to ravish a prostitute as the most virtuous of her sex;[97] as much an assault and battery for a prize-fighter to strike another in the course of a prize fight as to strike an innocent bystander;[98] as much embezzlement for a servant to steal money which the employer has obtained illegally as to fraudulently appropriate the fruits of a legitimate business;[99] as much a criminal uttering of counterfeit money to give it to a prostitute in compensation for unlawful sexual intercourse as to pay it out for groceries;[100] as much a criminal cheat to defraud one who is attempting to perpetrate a fraud in the same transaction as though he were acting honestly.[101]

There are cases in which the principle under discussion has been departed from, notably in People vs. McCord, 46 N. Y., 470. In that case, which was a prosecution for obtaining money under false pretenses, the false pretenses were that the accused was an officer and had

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[96] Hayne's Case, 12 Coke, 113; Ward vs. People, 3 Hill, 395.
[97] Pleasant vs. State, 15 Ark., 624; Might vs. State, 4 Hump., 194.
[98] Com. vs. Collberg, 119 Mass., 350.
[99] Com. vs. Smith, 129 Mass., 104; Rex vs. Beacall, 1 C. & P., 454; Woodward vs. State, 103 Ind., 127; 5 Am., Cr. 210.
[100] Reg. vs. Anon, 1 Cox C. C., 250.
[101] Reg. vs. Hudson, 8 Cox C. C., 305.

a warrant for the arrest of the victim, and the inducement to part with his property was that he should not be arrested if he would pay for it. Upon these representations the prisoner obtained a gold watch and a diamond ring. The majority of the court held that he could not be convicted of obtaining property by false pretenses, the court saying: "The prosecutor parted with his property as an inducement to a supposed officer to violate the law and his duties; and if in attempting to do this he has been defrauded, the law will not punish his confederate, although such confederate may have been instrumental in inducing the commission of the offence. Neither the law nor public policy designs the protection of rogues in their dealings with each other, or to insure fair dealing and truthfulness as between each other in their dishonest practices. The design of the law is to protect those who, for some honest purpose, are induced, upon false and fraudulent representations, to give credit or part with their property to another, and not to protect those who, for unworthy or illegal purposes, part with their goods."

There was in that case an able dissenting opinion by Peckham, J. This decision cannot be considered good law because it is based upon the fundamentally erroneous idea that the offense of a criminal is an offense against an individual instead of an offense against society. The clear weight of authority is against it, and in a late case a court, which had the question involved before it for the first time, after reviewing the authorities, adheres to the proposition which we have announced.[102]

[102] Re Cummins, 16 Col., 451. In the evolution of the law, when courts have disagreed upon a particular question, the latest decision by a court not hampered by a previous decision of its own, is most likely to strike the true key.

JURISDICTION.

CHAPTER II.

JURISDICTION OF CRIMES.

In the criminal law, jurisdiction means a lawful authority in a court to punish an act as a crime.

Whether or not a court, sitting anywhere in the United States, has jurisdiction to inflict criminal punishment in a given case, involves inquiry into a good many different questions. Many of these questions could only arise in the United States, partly, because there are two distinct governments within the territorial limits of every State in the Union, and partly, because these governments have written constitutions to which legislative enactments must conform, or they will be declared invalid by the courts. Our criminal law is largely founded upon the common law of England, where there is but one sovereignty and no written constitution to which an act of parliament must conform.

Blackstone says: "Parliament hath sovereign and uncontrollable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving and expounding of laws, concerning matters of all possible denominations, ecclesiastical or temporal, civil, military, maritime or criminal, this being the place where that absolute power, which must in all governments reside somewhere, is intrusted by the constitution of these kingdoms."[1]

No such power is found within the limits of our territories. The powers of our governments are distributed between the executive, the legislative and

[1] Bl. Com., 160.

the judicial branches, each of which is supreme within the limits of its own sphere. Constitutions are, with us, adopted directly by the people, and are for the most part, expressive of fundamental principles by which the people require that all branches of the government shall be controlled. The absolute power, which Blackstone says, "must in all governments reside somewhere," in the United States resides with the people. It is the function of the judiciary, when required to do so, to test the validity of legislative enactments by the standards of the constitution, or constitutions, with which they must conform, and no legislative power can override or control the exercise of this judicial function.

The jurisdiction to hear, try and determine the question of guilt, and to impose the appropriate penalty, depends upon these things:

1. Was there, at the time the act inquired into was committed, a valid law denouncing the act and prescribing a punishment therefor, and is the law in force at the time judgment is pronounced?

2. Was the alleged criminal act committed in a territory in which the law punishing it was in force?

3. Is the court before whom the alleged offender is brought to trial, the tribunal appointed by the law to try the offender and impose the penalty fixed by the law?

4. Is the respondent, when arraigned, lawfully subject to the power of the court?

If all of these questions can be answered in the affirmative, a lawful jurisdiction exists. If any one of them must be answered in the negative, jurisdiction does not exist, and there can be no trial and no punishment.

In the United States there exist two sovereignties (i. e., two supreme powers) in the same territory, "two distinct and separate sovereignties within the same territorial space, each of them restricted in its powers, and each, within the sphere of action prescribed by the Constitution of the United States, independent of the other."[2] The limits of this volume do not permit the printing of the entire opinion from which the above language is quoted. But the student will not omit to read and study that opinion as being the clearest and most authoritative exposition of the fundamental principles governing the matter now under consideration, which is to be found.[3] Out of this dual government and the existence of two sovereignties in the same territorial space arise many questions in the criminal law for which the English common law, which is the basis of our system of jurisprudence, criminal as well as civil, affords no precedent. It becomes necessary, therefore, to consider the sphere of each of these sovereignties in order to ascertain what is to be considered as a crime against either and what acts may be a crime against both. And in this discussion it will only be necessary to take into view what is involved in the first two propositions which have been enounced with regard to jurisdiction in the United States. That is, first, as to what acts are the legitimate subjects of criminal punishment by either or both of these sovereignties; and, second, within what territorial limits the jurisdiction of either is paramount and exclusive.

In United States vs. Booth it appeared that Booth had been charged before a United States commis-

[2] U. S. vs. Booth, 21 How., 513.

[3] See also Robb vs. Connolly, 111 U. S., 624, in which the language above quoted is repeated.

sioner with a violation of the Fugitive Slave Law, and had been committed by him to await the action of the United States grand jury. While imprisoned under this commitment, on a writ of habeas corpus allowed by a justice of the Supreme Court of the State of Wisconsin, he was discharged from his imprisonment by the Supreme Court of the State of Wisconsin upon the ground that the Fugitive Slave Law of the United States was in conflict with the Constitution of the United States, and void.

Afterwards the United States grand jury returned an indictment against Booth for the offense with which he had been charged before the commissioner, and this indictment was regularly tried before the District Court of the United States for the District of Wisconsin. As a result of the trial, Booth was found guilty and sentenced to be imprisoned for one month, and to pay a fine of one thousand dollars and costs of prosecution, and to remain in custody until the fine and costs were paid.

While he was imprisoned under this sentence, he sued out another writ of habeas corpus in the Supreme Court of Wisconsin, and upon the hearing of this writ, he was discharged from imprisonment upon the same ground that he had been discharged from his imprisonment, under the commitment of the commissioner; that is, that the Fugitive Slave Law was unconstitutional and void. The Supreme Court of the United States issued writs of error to the Supreme Court of the State of Wisconsin upon both of these judgments.

The important principle settled by the Supreme Court of the United States in these cases was that the Supreme Court of the State of Wisconsin had no jurisdiction to inquire into the legality of the imprisonment of a person who was imprisoned under

the authority of a judicial officer of the United States, or under the judgment of a United States Court. In the course of the decision the Supreme Court of the United States used the following language: —

"We do not question the authority of a state court, or judge, who is authorized by the laws of the State to issue the writ of habeas corpus, to issue it in any case where the party is imprisoned within its territorial limits, provided it does not appear, when the application is made, that the person imprisoned is in custody under the authority of the United States. The court or judge has a right to inquire in this mode of proceeding, for what cause and by what authority the prisoner is confined within the territorial limits of the state sovereignty. And it is the duty of the marshal, or other person having the custody of the prisoner, to make known to the judge or court, by a proper return, the authority by which he holds him in custody. This right to inquire by process of habeas corpus, and the duty of the officer to make a return, grows, necessarily, out of the complex character of our government, and the existence of two distinct and separate sovereignties within the same territorial space, each of them restricted in its powers, and each within its sphere of action, prescribed by the Constitution of the United States, independent of the other. But after the return is made, and the state judge or court judicially apprised that the party is in custody under the authority of the United States, they can proceed no further. They then know that the prisoner is within the dominion and jurisdiction of another government, and that neither the writ of habeas corpus, nor any other process issued under state authority, can pass over the line of division between the two sovereignties. He is then within the dominion and exclusive jurisdiction of the United

States. If he has committed an offense against their laws, their tribunals alone can punish him. If he is wrongfully imprisoned, their judicial tribunals can release him and afford him redress. And although, as we have said, it is the duty of the marshal, or other person holding him, to make known, by a proper return, the authority under which he detains him, it is at the same time imperatively his duty to obey the process of the United States, to hold the prisoner in custody under it, and to refuse obedience to the mandate or process of any other government. And, consequently, it is his duty not to take the prisoner, nor suffer him to be taken, before a state judge or court upon a habeas corpus issued under state authority. No state judge or court, after they are judicially informed that the party is imprisoned under the authority of the United States, has any right to interfere with him, or to require him to be brought before them. And if the authority of a state, in the form of judicial process or otherwise, should attempt to control the marshal, or other authorized officer or agent of the United States, in any respect, in the custody of his prisoner, it would be his duty to resist it, and to call to his aid any force that might be necessary to maintain the authority of law against illegal interference. No judicial process, whatever form it may assume, can have any lawful authority outside of the limits of the jurisdiction of the court or judge by whom it is issued; and an attempt to enforce it beyond these boundaries is nothing less than lawless violence." U. S. vs. Booth, 21 How., 513.

In Robb vs. Connolly the principle established in United States vs. Booth was reaffirmed, but it was held that it did not cover the facts of that case. In that case a writ of habeas corpus was issued by a state court of California to the agent of the Governor

of the State of Oregon, who was taking a prisoner back to Oregon under a warrant of extradition. This was upon the ground that the agent, to convey the prisoner back to Oregon, was not an agent or officer of the United States. Robb vs. Connolly, 111 U. S., 624.

A very interesting case which helps to mark the boundary line between the jurisdiction of the State Courts and the jurisdiction of the United States Courts is the case of Cunningham vs. Neagle, 135 U. S., 1. It proceeds upon the same theory as the other cases cited; that is, that an officer of the United States, engaged in performing any duty as such officer, is subject only to the jurisdiction of the United States Courts, and is not subject to the jurisdiction of any state court.

Neagle was a deputy United States marshal and had been detailed by the marshal of his district to attend Mr. Justice Field, of the Supreme Court of the United States, while traveling through California from one part to another of his judicial circuit, and to protect Judge Field against any assault that might be made upon him.

It appeared that some time before the occurrence which gave rise to the prosecution of Neagle, Judge Field had rendered a decree against one Mrs. Terry, formerly Sarah Althea Hill, and that this decree had excited in Terry and his wife the most violent personal animosity towards Mr. Justice Field, and that even while Mr. Justice Field was delivering his opinion, Terry and his wife created a scene of violence in the court room, and it became necessary to remove them both from the court room by force, and to take them into custody. For this conduct both Terry and his wife were sentenced by the court to imprisonment for contempt, Mrs. Terry for one month and Terry

for six months, and these sentences were immediately carried into effect.

From that time until his death, the denunciations by Terry and his wife of Mr. Justice Field were open, frequent, and of the most vindictive and malevolent character, and they made violent threats against his personal safety. It was on account of these facts that Neagle had been detailed to attend Justice Field and to care for his personal safety.

On the 14th day of August, 1889, while Justice Field and Neagle were on their way to Los Angeles, to hold the Circuit Court of the United States at that place, the train stopped at Fresno, the residence of Mr. and Mrs. Terry, and they got on the train. The train stopped for breakfast at Lathrop, and Justice Field and Neagle got out of the car and went into the eating room for breakfast. Shortly afterwards Mr. and Mrs. Terry came into the breakfast room.

As soon as Mrs. Terry recognized Justice Field she hurried back to the car and took from it a satchel, containing a revolver. Before she returned to the reading room Terry sneaked up behind Judge Field and, before he was observed, struck him first on one side of his face and then on the other. Neagle, who was sitting next to him, rose from his seat with a revolver in his hand, and shouted out, "Stop! Stop! I am an officer." Upon this Terry started to draw a bowie-knife; and Neagle fired two shots from his revolver into the body of Terry, who immediately sank down and died in a few minutes.

Mrs. Terry went before a California magistrate and swore out a warrant for Neagle upon a charge of murder. Thereupon, upon a proper petition, a writ of habeas corpus was issued by the Circuit Court of the United States for the Northern District of California, to deliver Neagle from the custody of the

California sheriff on that charge. The United States Circuit Court discharged Neagle from custody upon the ground that, having been in the performance of his duty as an officer of the United States, he was not subject to the jurisdiction of the state courts, and this decision was affirmed on appeal by the Supreme Court of the United States. Re Neagle, 135 U. S., 1.

OF THE POWER OF THE CONGRESS TO ENACT CRIMINAL LAWS.

The national government in the United States is a government of limited powers, or, as it is sometimes expressed, a government of "conferred" powers. It is, in other words, a created or artificial sovereignty, and possesses only such powers as are, expressly or impliedly, conferred upon it by the constitution of the United States. This doctrine is formally enunciated in the tenth amendment to the constitution, which reads: "The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." From this it results that there is no inherent general power in the Congress to enact criminal laws. The general power to enact criminal laws remains with the states, each acting within its own territory. There is, it is true, a general power in the United States to enact criminal laws which shall be in force in those portions of the national territory over which it has exclusive legislative jurisdiction. But as to those portions of the national territory which are subject to the legislative jurisdiction of the several states, the power of the national government to enact criminal laws is a limited one.

By the sixteenth subdivision of Section 8 of Article I. of the Constitution, it is provided that the

Congress shall have power: "To exercise exclusive legislation in all cases whatsoever over such district, not exceeding ten miles square, as may by cession of particular states, and the acceptance of Congress, become the seat of government of the United States,[5] and to exercise like authority over all places purchased, by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards and other needful buildings."[6]

This exclusive territorial legislative power also exists in the territories of the United States except in so far as local legislative powers have been conferred on territorial legislatures.

The authority of the Congress to pass criminal laws which shall be in force within the territorial limits of the several states is limited by the functions of the national government. There is an inherent power in every government to enact all laws necessary to enable it to execute its functions and to punish all acts which interfere with its full and complete exercise of those functions. The criminal statutes of the United States which are in force in the territory of the several states are exclusively of this character. An act done within the territorial jurisdiction of any state must impinge somewhere upon the national government in the exercise of some one of its governmental functions or it cannot be punished as a crime by the United States.[7]

From a consideration of the functions of the national government it results that common law crimes are not punishable in the courts of the United

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[5] The District of Columbia.

[6] State vs. Kelly, 76 Me., 331; 5 Am. Cr., 393.

[7] The student will find the statutes governing offenses against which the Federal Government has legislated, com-

States,[8] or, in other words, the common law is not a source of jurisdiction to the courts of the United States in criminal matters, except, perhaps, where it has exclusive territorial jurisdiction, and this is the settled law. The same reasoning, by virtue of which it has been held that the common law is a source of jurisdiction to punish crime in the several states, applies with equal force to the courts of the United

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mencing at Section 5323 of the Revised Statutes of the United States.

Under that statute the offenses are classified as follows:

I. Crimes against the existence of the government, such as treason, misprision of treason, seditious conspiracy, etc.

II. Crimes arising within the maritime or territorial jurisdiction of the United States, such as murder within any fort, arsenal, dockyard, magazine, and on the high seas or any arm of the sea, within the admiralty or maritime jurisdiction of the United States. There are also provisions similar to those in different states against all the common and usual offenses when committed on the high seas or in any place under the exclusive jurisdiction of the United States, such as larceny, inciting revolt or mutiny, breaking and entering vessels, piracy, arson of dwelling house within any fort, arson of vessels of war, etc.

III. Crimes against justice, such as perjury in any case in which the law of the United States authorizes an oath to be administered, corruption of jurors, etc.

IV. Crimes against the operation of the government, such as forging United States securities, letters patent, public records, counterfeiting national bank notes, bribery of United States officers or congressmen, larceny of personal property of the United States, counterfeiting gold or silver coin, robbery of the mails, breaking and entering postoffices, etc.

V. Official misconduct, such as the extortion of money by an officer under color of his office, the acceptance of bribes by judges or members of Congress.

VI. Crimes against the elective franchise and civil rights of citizens, such as the prevention of citizens from voting, the prevention or intimidation of voters by bribery or threats, the depriving of citizens of civil rights under color of state laws, frauds in voting, etc.

[8] U. S. vs. Hudson, 7 Cranch, 32; U. S. vs. Coolidge, 1 Wheat., 415; U. S. vs. Lancaster, 2 McLean, 431.

States in places where the nation has exclusive territorial jurisdiction. 1 Bishop Cr. Law., Sec. 201.

OF THE CONCURRENT LEGISLATIVE POWER OF THE UNITED STATES AND THE SEVERAL STATES.

There are many acts which may be punished criminally, both by the several states and by the United States. The mere fact that an act is within the legislative power of the general government does not exclude state jurisdiction over the same act. For a full discussion of the principles involved in this question the reader is referred to the cases cited below.[9] There is a United States statute which undertakes to exclude the jurisdiction of the states over certain classes of offenses, and this has been given effect in a Michigan case.[10] But being a state decision, and apparently in conflict with many decisions of the Supreme Court of the United States, its authority is doubtful.

The common law is a source of jurisdiction to punish common law crimes in some but not all of the States.

On this subject every lawyer must consult the authorities of his own State. The modern tendency is to cover the whole body of the criminal law by statute, and even in States where it has been held that common law crimes were punishable this may be the law no longer. A few illustrative cases are cited in the note.[11]

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[9] People vs. McDonell, 80 Cal., 285; 8 Am. Cr., 147; re Murphy, 5 Wyo.; 9 Am. Cr., 122.

[10] People vs. Fonda, 62 Mich., 41.

[11] In Massachusetts it was held that a libel was criminally punishable, although there was no statute prescribing its punishment. Com. vs. Chapman, 13 Metc., 68. In Maine it

OF THE POWER OF THE SEVERAL STATES TO ENACT CRIMINAL LAWS.

Outside of the limits which have been marked out as the limits of the criminal jurisdiction of the national government, the several States have each a general, exclusive and absolute authority to punish crimes and enact criminal laws within its own territorial limits, except in so far as this general authority in the several States is restrained by certain express provisions of the national constitution.

It is provided by the constitution of the United States that no bill of attainder or ex post facto law shall be passed either by the United States or any State, and by the first section of the fourteenth amendment to the constitution, that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law, etc." Except in so far as the power of the States is limited by those provisions the jurisdiction of each State to punish an act committed within its own territorial limits as a crime is general and exclusive.

BILLS OF ATTAINDER.

We have seen that, by the constitution of the

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was held indictable to cast a dead body into a river; Kanavan's case, I Greenl., 226. In Pennsylvania a common law indictment was sustained for exhibiting an indecent picture; Com. vs. Sharpless, 2 Serg. & R., 91. In Virginia, Tennessee, Illinois, and other States, prosecutions for common law crimes have been upheld. In Michigan Judge Campbell said: "While we have kept in our statute-books a general statute resorting to the common law for all non-enumerated crimes, there has always been a purpose in our legislation to have the whole ground of criminal law defined, so far as possible, by statute. There is no crime whatever punishable by our laws except by virtue of a statutory provision." Lamphere's case, 61 Mich., 105.

United States, it is prohibited, both to the Congress and to the legislature of the several States, to pass bills of attainder, and ex post facto laws. In England there have been many acts of parliament to attaint particular persons of treason or felony. The penalties of an attainder to one who had committed treason or felony were of an extraordinary character. All of the estate, real and personal, of the attainted person, was forfeited to the crown; he suffered corruption of blood, that is, he was no longer legally of kin to anybody, and, therefore, he had no inheritable blood; so far as his blood was concerned, he was as though he had never been born, and so nothing could pass by inheritance, to, from or through him; and, also, he could not sue in a court of justice.

EX POST FACTO LAWS.

In this term are included laws which assume to punish an act which was done before the law was passed, and which was not punishable when done; laws which inflict a more severe penalty on an offense than was prescribed by the law which was in force when the act was committed; laws changing the statute of limitations so as to permit a prosecution for an offense, prosecution of which was barred by the former statute, when the new statute was passed;[12] laws which change the rules of evidence so as to permit a conviction upon less evidence than would have been necessary when the deed was done.[13]

In a general way the definition given by Washington, J., of what is an ex post facto law is the briefest

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[12] State vs. Moore, 42 N. J. L., 208.
[13] Kring vs. Mo., 107 U. S., 221.

and most comprehensive which is to be found. It is in these words:

An ex post facto law is one which, in relation to the offense, or its consequences, alters the situation of a party to his disadvantage.[14]

We will illustrate this proposition by some of the leading cases. In Massachusetts a man was found guilty in September, 1865, of maintaining a tenement for the sale of intoxicating liquors. Under the law, as it was when he was convicted, the penalty was, imprisonment not more than one year, or by a fine of not less than two hundred, or more than one thousand dollars. The respondent was not sentenced until May 31st, 1866. Between the date of the verdict of guilty and that of the sentence, a new law was passed, repealing the law in force at the time of the verdict, and providing that the offense, of which the respondent had been found guilty, should be punished by a fine of not less than fifty dollars, nor more than one hundred dollars, and imprisoned not less than three, nor more than twelve, months, except that if the accused could show to the satisfaction of the court that he had not before been convicted of a similar offense, the court might, in its discretion, impose a fine without imprisonment, or imprisonment without a fine. The new law went into effect May 29th, two days before the sentence. When the respondent was sentenced on May 31st, 1866, he was sentenced to one year's imprisonment. It was held that the sentence was void, and the respondent must be discharged. The court summed up the reasons for the decision in this language: "The result is, that the old rule of punishment, laid down in the previous

[14] U. S. vs. Hall, 2 Wash. (C. C.), 366.

statutes, having been superseded and repealed, without any saving of prosecutions pending, or offenses already committed, did not justify the defendant's sentence after the repealing statute took effect; the statute of 1866, establishing a new rule of punishment, in aggravation of the rule in force when his offense was committed, could not constitutionally apply to his case; and there being, therefore, no law to authorize him to be punished, he is entitled to be discharged."[15]

In New York a man was tried in February, 1861, for arson in the first degree, and was found guilty. The crime was committed in June, 1857. At the time the crime was committed the offense was punishable by death. In 1860 the death penalty was abolished, and imprisonment for life substituted. After the verdict of guilty the prisoner was sentenced to imprisonment for life. The Court of Appeals held that this sentence was void, and there being no power in the court to remand the prisoner for a new trial, he must be discharged.[16] This case proceeded upon the ground that a law punishing a crime by any penalty which could not have been imposed at the time the offense was committed was ex post facto. It has been dissented from upon the ground that any penalty less than death is an amelioration, and not aggravation, of the penalty.[17] In Kring vs. Missouri,[18] the prisoner was charged with murder in the first degree, committed in January, 1875. He was tried a number of times and was finally convicted on his plea of guilty of murder in the second degree, and sentenced to imprisonment for twenty-five years.

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[15] Flaherty vs. Thomas, 12 Allen, 428.
[16] Shepherd vs. People, 25 N. Y., 506.
[17] Com. vs. Wyman, 12 Cush., 237.
[18] 107 U. S., 221.

This judgment was reversed, and the case was remanded for a new trial. On the next trial he was convicted of murder in the first degree and sentenced to be hung. This judgment, having been affirmed by the Supreme Court of Missouri, was taken by writ of error to the Supreme Court of the United States upon this ground. At the time of the commission of the crime the law was that a conviction of murder in the second degree operated as a final acquittal of the charge of murder in the first degree. This was changed by an amendment to the constitution which took effect in November, 1875. It was held that, as to Kring's crime, this was ex post facto, and the conviction of murder in the first degree could not stand. In Medley's case[19] it appears that Medley was charged with murder in Colorado, committed on the 13th day of May, 1889. He was tried and convicted on September 24th, and sentenced on November 29th. Between the time of the commission of the crime and the conviction and sentence, on July 19th of the same year, a new law went into force in Colorado, changing the punishment for murder. The new law provided, among other things, that a person convicted of a capital crime, and under sentence of death, should be placed in the penitentiary and there kept in solitary confinement until he was hung; and that only certain persons should be allowed to see him, and those only in accordance with the prison regulations; the particular day and hour of the execution was to be fixed by the warden of the prison, and that was to be kept secret from every person, including the condemned, except those whom the warden might invite to be present at the execution. The Supreme Court of the United States held that the provision

[19] 134 U. S., 160.

for solitary confinement, the provision which prevented the prisoner receiving visits from his relatives and friends at his pleasure, the imprisonment in the penitentiary, which is an "infamous" punishment in itself, and the horrible feelings which the uncertainty of the hour of death must awaken in the prisoner, all of which provisions found their origin in the new statute, were aggravations of the death penalty as it had previously existed in Colorado, and that, as to a crime committed before the new statute took effect, the statute was ex post facto.[20]

The foregoing cases afford illustrations of another proposition which is to be stated in connection with the tests which have been stated as to when jurisdiction to inflict criminal punishment exists. It is this:

If the law, in force at the time the criminal act was committed, is repealed, without any saving clause, before final judgment (sentence), the jurisdiction to pass sentence under that law is gone.[21]

There are a number of things which require brief attention in connection with this proposition. As to the matter of repeal, it is proper to call the attention of the student to the fact that it is not necessary to repeal a law that the repealing act should repeal it in express terms. A statute may be repealed in express terms. The repealing act may provide that Act No. 345 of the Public Acts of Michigan of the year 1873, be and is hereby repealed. This is an express repeal. It may provide that all acts and

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[20] See also Hartung vs. People, 22 N. Y., 95.

[21] Com. vs. Marshall, 11 Pick., 350; State vs. Ingersoll, 17 Wis., 631; Keller vs. State, 12 Md., 323; Com.. vs. Duane, 1 Bin. (Pa.), 601; State vs. Williams, 97 N. C., 455; Wheeler vs. State, 64 Miss., 162.

parts of acts inconsistent with the provisions of the repealing statute be and the same are hereby repealed. But these words where they occur in a statute are purely superfluous. For, it is a maxim of our law that "leges posteriores priores abrogant."[22] And the body of law which is based upon this maxim includes the proposition that a later statute which covers the whole ground covered by the previously existing law upon the same subject operates necessarily as a repeal or an abrogation of the previously existing body of law, whether common law or statutes, upon the same subject.[23] But whether a law is repealed expressly or by implication, the effect is the same, and is as stated in the proposition now under discussion. The effect generally of a repealing act has been well stated in this language. Said Lord Chief Justice Tindal: "The effect of a repealing statute, I take to be to obliterate the statute repealed as completely from the records of parliament as if it had never passed, and that it must be considered as a law that never existed, except for the purpose of those actions or suits which were commenced, prosecuted and concluded while it was an existing law."[24]

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[22] Mr. Broom gives the meaning of this phrase in our law as follows: "When the provisions of a later statute are opposed to those of an earlier, the earlier statute is considered as repealed." Broom's Legal Maxims, p. 27.

[23] Long, J., in Moore vs. Kenockee, 75 Mich., on p. 340.

[24] Key vs. Godwin, 4 M. & P., 341.

The repeal of a statute under which a conviction has been had does not affect such a conviction if a judgment has been entered. In other words, if the act for which conviction is had is criminal at the time of the entry of judgment or sentence, a subsequent repeal of a statute making such an act criminal does not have any effect on the judgment.

People vs. Hobson, 48 Mich., 27; Aaron vs. State, 40 Ala., 307; State vs. Long, 78 N. Car., 576.

The following extract from Sedgwick, on the Construction of Statutory and Constitutional Law, presents the doctrine very clearly and tersely: "Upon this principle the repeal of a statute puts an end to all prosecutions under the statute repealed, and to all proceedings growing out of it pending at the time of the repeal. There can be no legal conviction unless the act is contrary to law at the time it is committed, nor can there be a judgment unless the law is in force at the time of the indictment and of the judgment. Hence, a repealing law is sometimes made to operate prospectively, and a saving clause is inserted to prevent the operation of the repeal, and continuing the repealed law in force as to all pending proceedings and prosecutions.[25] So in the Supreme Court of the United States it has been held that the repeal of a statute giving penalty puts an end to all actions pending for penalties under the act at the time of the passage of the repealing statute.[26] So in the Circuit Court of the United States, where a man was indicted for perjury under the bankrupt law, which had been repealed before indictment, Washington, J., said: "Every offense for which a man is indicted must be laid against some law, and it must be shown to come within it, and the law must be subsisting. If the legislature has ceased to consider the act in the light of an offense, the purposes of punishment are no longer to be answered."[27] So the repeal of a law imposing a penalty, though after conviction, arrests the

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[25] Miller's case, 1 W. Bl., 451; Rex vs. Justices of London, 3 Burr, 1456; Com. vs. Cooley, 10 Pick., 37; Com. vs. Marshall, 11 Pick., 350; see also Butler vs. Palmer, 1 Hill, 324.

[26] Yeaton vs. United States, 5 Cranch, 281; Schooner Rachel vs. United States, 6 Cranch, 329; Norris vs. Crocker, 13 How., 429; United States vs. Passmore, 4 Dall., 372.

[27] Anon 1 Wash., C. C. R., 84.

judgment.[28] And the same rule applies to all proceedings, whether civil or criminal, going on by virtue of a statute at the time of its repeal. But the repeal of a criminal law by an amendatory act, which changes the repealed act only by reducing the punishment, when the repeal and re-enactment are intended to continue in force the uninterrupted operation of the old statute, will apply to crimes committed before the new act takes effect; and the offender may be punished under the new statute.[29]

Cruel and unusual punishments are forbidden by the Federal Constitution.

The Federal and most of the state constitutions have forbidden the imposition of cruel and unusual punishments. It is difficult to determine what amounts to cruel and unusual punishment, and the courts have been seldom called upon to determine which punishments infringe upon this clause of the constitution.

In a recent case it was held that in order that the court might declare a certain act to be unconstitutional, it must find that the minimum punishment provided by the law is so disproportionate as to shock the moral sense of the people. People vs. Morris, 80 Mich., 634.

It is to be doubted whether this test can be of any practical assistance in determining whether an act is unconstitutional. The prohibition seems to have been directed against those degrading punishments which are not known to the law or which have been banished by it as cruel and unusual.

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[28] Com. vs. Duane, 1 Binn., 601, 608.
[29] Hair vs. State, 16 Neb., 691; 4 Am. Cr., 127.

An act prescribing a punishment which is recognized by the law as one of the methods of punishment is constitutional, although such punishment is severe, and this is true in the opinion of the authors, even though such punishment is disproportionate to the offense.

In re Bayard, 25 Hun., the court says: "We first find the injunction against cruel and unusual punishments in the Declaration of Rights, presented by the convention to William and Mary before settling the crown upon them in 1688. The declaration recites the crimes and errors which had made the revolution necessary. These recitals consist of the acts only of the former king and the judges appointed by him, and one of them was that cruel and unusual punishments had been inflicted. * * * The punishments complained of were the pillories, slittings and mutilations which the corrupt judges of King James had inflicted without warrant of law, and the declaration was aimed at the acts of the executive; for the judges appointed by him and removable at pleasure were practically a part of the executive. It clearly did not then refer to the degree of punishment, for the criminal law of England was at that time disgraced by the infliction of the very gravest punishment for slight offenses, even petit larceny then being punishable with death."

The student's attention may be called to the following cases which have arisen under the constitutions prohibiting cruel and unusual punishment:

In 1816 the legislature of New York passed an act to suppress dueling, the punishment being that the convicted person should be incapable of holding or being elected to any post of profit, trust or emolument, civil or military. The court held that the pun-

ishment did not come within the constitutional prohibition as cruel and unusual.[30]

A statute of the Territory of New Mexico for horse-stealing imposed the punishment of not less than 30, nor more than 60, lashes on the bare back. Under the provisions organizing the territory, it was provided that the laws passed by the legislative assembly should be submitted to the Congress of the United States, and, if disapproved, should be null and of no effect. The act was submitted to Congress and had never been disapproved. The law was held constitutional.[31]

JURISDICTION OF COURTS, AS DEPENDING ON THE PLACE WHERE THE CRIME IS COMMITTED.

It is a fundamental principle of our system of law that indictable crimes shall be tried by a jury. And it is equally true that this trial must be by a jury of the "vicinage," which with us usually means by a jury of the county in which the crime was committed.[32]

This is the rule in the several States. The United States does not have jurisdiction by counties, but by judicial districts, into which, for judicial purposes, the United States is divided since juries in the United States are drawn from the district at large. The principle is that an accused person must be tried by a jury summoned from the local jurisdiction in which the crime was committed.[33] There are some crimes which may be partly committed in one juris-

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[30] Barker vs. People, 3 Cow., 686.

[31] Garcia vs. Territory, 1 N. M., 415; Ligan vs. State, 3 Heisk, 159.

[32] Swart vs. Kimball, 43 Mich., 443; Hill vs. Taylor, 50 Mich., 549.

diction and partly in another, and therefore, may be tried in either. For instance, it is the law with regard to conspiracy that an alleged conspirator may be tried either in the jurisdiction where the conspiracy was entered into, or in any jurisdiction in which any overt act in pursuance of the conspiracy was committed.[34] And in embezzlement it is the doctrine of the common law that the accused is subject to prosecution either in the jurisdiction where the embezzlement was actually committed, or in the jurisdiction where he was bound to account, and failed to account, for the money or property which came into his hands by virtue of his employment.[35]

And in larceny it is held that the thief commits a fresh larceny in every jurisdiction into which he flees with the stolen property in his possession.[36] And in homicide it is the prevailing doctrine that the slayer may be prosecuted either in the jurisdiction where the fatal blow was inflicted or where death ensued from it.[37]

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[33] The Massachusetts bill of rights declare that "in criminal prosecutions, the verification of facts in the vicinity where they happen is one of the greatest securities of the life, liberty, and property of the citizen."

[34] Bloomer vs. State, 48 Md., 521; Com. vs. Gillespie, 7 S. & R., 469.

[35] Queen vs. Rogers, 3 Queen's Bench, Div. 28; 3 Am. Cr., 503.

[36] State vs. Douglas, 17 Mo., 193; Crow. vs. State, 18 Ala., 541; Com. vs. Rand, 7 Metc., 475. And the same principle has been applied in a case of abduction. The original abduction having taken place in New York, it was held that dissuading the girl in New Jersey from returning to her home amounted to a fresh abduction in New Jersey. State vs. Gordon, 4 Am. Cr., 1.

[37] Tyler vs. People, 8 Mich., 320; Com. vs. Macloon, 101 Mass., 1; contra Riley vs. State, 9 Humph. (Tenn.), 646; People vs. Gill, 6 Cal., 637.

Another exception to the rule hereinafter stated arises in

But subject to these exceptions the rule must be stated as follows:

Every criminal charge must be prosecuted in the judicial district in which the alleged crime was committed.

It becomes necessary, therefore, to inquire by what principle the locality of a crime is to be fixed.

In the first place it is to be remarked that generally jurisdiction does not depend upon the locality in which the accused is found at the time he set in motion the force which is to effect the crime, but, on the other hand, jurisdiction resides where the intended effect is brought about, or is intended to be brought about.

Therefore, a man may be guilty of a crime in a jurisdiction in which he was never personally present. If a man, near the boundary line of a state, shoots at and injures a man in another state, he is triable in the latter state.[38] If a man in Ohio makes false pretenses by letters sent by mail to a merchant in New York and thereby procures the latter to deliver goods to his agent in New York, he is guilty of obtaining goods by false pretenses in New York and not in Ohio.[39] If one sends a forged instrument in a letter,

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the case of citizens temporarily abroad. Such citizens may be punished for certain acts committed in a foreign country. Thus, a citizen of the United States may be punished for taking a false oath before a consul of the United States while abroad.

[38] Com. vs. McCloon, 101 Mass., 1. But if a man receives a mortal wound in one state and dies in another, the murderer must be tried in the state where the wound was inflicted. Stout vs. State, 76 Md., 317; 9 Am, Cr., 398.

[39] Adams vs. People, 1 Comst. (N. Y.), 173; Norris vs. State, 25 Ohio St., 217; 2 Am. Cr., 85; State vs. Chapin, 17 Ark., 561; State vs. Schaeffer, 89 Mo., 271; 6 Am. Cr., 259; Wilcox vs. Wolze, 34 Ohio St., 520.

to defraud the person to whom it is mailed, he is guilty of the uttering where the letter is received.[40] Illustrations might be multiplied, but they are unnecessary. A crime consists of an act and an intent. And an act, as we have seen, is the doing or saying something which does or may produce an effect on a person or thing.[41] Since neither the act nor the intent alone constitutes the crime, the crime is committed where they concur, and they concur at the place where the intent is that the act shall take effect. Or, in other words, it is plain, upon reason and authority, that when one intends to commit a crime in New York and sets in motion a force which consummates the crime in New York, he must be held to have committed the crime in New York. And, if he did not intend to commit a crime in Ohio, and did nothing by which a crime in Ohio could be committed, he cannot be charged with having committed a crime in Ohio. The simple and elementary principles of the law are enough to settle most of the questions of this kind which can arise.[42]

There are some exceptions arising out of the necessity of the case to the rule that every crime must be tried in the judicial district where the crime is committed.

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[40] People vs. Rathburn, 21 Wend., 509.

[41] Ante, p. 3.

[42] There are in most of the states, statutes providing that where a crime is committed on or near the boundary line between two counties, the prosecution may take place in either county. The purpose of these statutes is to avoid difficulties which might arise in proving in which of the two counties the crime was actually committed. When no such difficulty arises the law should not be invoked for the purpose of trying the accused in the wrong jurisdiction and if it is done a conviction in the wrong county will be set aside. Buckrice vs. People, 110 Ill., 29; 4 Am. Cr., 106.

The ships of a nation on the high seas are regarded as a part of the national territory and crimes committed upon them are punishable in the national courts.

When a vessel is on the ocean and more than a marine league from the shore, measuring from low water mark, she is on the high seas and beyond the territorial limits of the nation and of any state. In such a case the Federal courts have exclusive jurisdiction to punish crimes committed on board of an American vessel.[43]

The jurisdiction of the several states which lie upon the shores of the ocean extends to every crime committed within the marine league limit.[44] This is also true of those arms of the sea which lie enclosed within the national territory, as in the case of Delaware and Chesapeake Bays, although in some parts it is more than two marine leagues from shore to shore.[45]

In the case of public ships, such as men of war, the jurisdiction of the national government is paramount and exclusive, wherever they may happen to be, whether on the high seas or in a foreign or domestic port.

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[43] U. S. vs. Holmes, 5 Wheat., 412; U. S. vs. Palmer, 3 Wheat., 610. And the rule is the same whether the crime is committed by a citizen or a foreigner. Reg. vs. Lopez, 7 Cox C. C., 431.

[44] Com. vs. Peters, 12 Metc., 387; U. S. vs. Bevans, 3 Wheat., 336; Manley vs. People, 3 Selden, 295; Com. vs. Games, 2 Va. Cas., 172.

[45] The jurisdiction of the several states abutting on the Great Lakes is not limited by rule above stated, but extends to the boundary line of each of said states. People vs. Tyler, 7 Mich., 160.

Private ships in the harbors of a civilized nation are subject to the jurisdiction of that nation.[46]

Any civilized nation has jurisdiction to punish pirates who are not regarded as citizens of any country.[47]

JURISDICTION OF THE PERSON.

As a general rule all persons, whether citizens or aliens, are under a duty to obey the law of the territorial limits within which they are situated, and it follows that the courts having jurisdiction of such territorial limits have jurisdiction to punish all persons who may commit a breach of its laws within such territory.

To this general rule, under the law of nations, there are a few unimportant exceptions. The following persons are not amenable to the law, even for offenses committed within the territorial jurisdiction of this country:

Foreign friendly sovereigns and their attendants.

Ambassadors and diplomatic agents of foreign countries, their attendants and servants. This exception does not extend to consuls.

The army or navy of a friendly foreign power peaceably within the territorial limits of this country.

Enemies in war committing belligerent acts in carrying war.

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[46] Wildenhus' case, 120 U. S., 1; People vs. Tyler, 7 Mich., 161; s. c. 8 Mich., 320.

[47] The Marianna Flora, 11 Wheat., 1.

It is a general rule that a court before whom a prisoner is brought, charged with a criminal offense, will proceed to try him, without listening to an objection that the proceedings which brought the prisoner within the power of the court were illegal.[48]

This doctrine is applied in its fullest effect to cases where the prisoner was kidnaped in a foreign state[49] or country.[50] Perhaps the case which most strikingly illustrates this doctrine is that of Plyant Mahon, decided in 1888. Mahon had been indicted for murder in Kentucky. He was a resident of West Virginia. The governor of Kentucky made a requisition on the governor of West Virginia for his extradition for trial in Kentucky. This requisition the governor of West Virginia refused to honor. The agent of the State of Kentucky then gathered a body of armed men and kidnaped Mahon and brought him to a Kentucky jail, where he was arrested on a bench warrant. The governor of West Virginia then demanded that Mahon should be returned to West Virginia, but this the governor of Kentucky refused to order. Then a writ of habeas corpus was sued out in the Federal court of Kentucky, and on this state of facts it was held that no constitutional right of Mahon's had been violated, and that he should be held for trial on the indictment.[51] This case follows the

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[48] Hawley Interst. Extrad., 96.

[49] State vs. Brewster, 7 Vt., 118; Dow's case, 18 Pa., 37; State vs. Ross, 21 Iowa, 467; ex parte Barker, 6 Sou. Rep. (Ala.), 7; Ker vs. People, 110 Ill., 627; re Lagrave, 45 How. Pr.; re Miles, 52 Vt., 609; People vs. Howe, 4 Parker, 253.

[50] Ker vs. Illinois, 119 U. S., 436.

[51] In re Mahon, 34 Fed. Rep., 525; s. c. Mahon vs. Justice, 127 U. S., 700. The contrary doctrine has been maintained in State vs. Simmons, 39 Kas., 282.

decision of the Supreme Court of the United States in Ker's case. Ker, who was an embezzler, was kidnaped in South America and brought to the United States for trial. He sued out a writ of habeas corpus, and it was determined by the Supreme Court that he was not entitled to relief, but was properly triable in Illinois, where his crime had been committed. The court suggests, with grim humor, that when he regains his liberty he may have an action for false imprisonment against his captors.[52] It is also held that a person cannot claim immunity because he was enticed into the jurisdiction by stratagem and fraud.[53] The fundamental principle on which the doctrine which these cases illustrate rests in this: The criminal himself never acquires a personal right of asylum or refuge from the consequences of his crime anywhere. The government of the country to which he flees may insist that he shall not be extradited from there unless by its consent, and under such conditions as it shall assent to. But the fugitive cannot assert these rights of the foreign government in our courts unless he was surrendered by the foreign state. He has no personal right to an asylum, and the trial court before which he is brought will not inquire in what manner the officers who bring him before the court obtained possession of his body. It is enough that he is there, in the power of the court, and charged with a crime for which he is to be tried. This is the rule in all cases except where a prisoner has been extradited by virtue of a treaty. In such cases the demanding government owes a duty, not to the prisoner himself, but to the government which surrendered him, not to violate the compact or the

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[52] Ker vs. Illinois, 119 U. S., 436.
[53] Re Brown, 28 Fed. Rep., 653.

law under which he was surrendered. And this compact or law, it is settled, the courts will give effect to at the instance of the prisoner himself.

A person extradited under a treaty with a foreign government cannot be tried for any offense not named in the warrant of extradition.

The law is now settled that a person brought within the jurisdiction to answer to a charge on which he has been extradited under a treaty can only be prosecuted on that charge. When that prosecution has terminated, whether by acquittal, the cause having been dismissed, a neglect to prosecute within a reasonable time, or by serving out a sentence of imprisonment which has been imposed, the person extradited must be allowed a reasonable time in which to return to the State or country from which he was extradited before he can be proceeded against upon any other charge. Should a prosecution be attempted, he may set up his immunity by a plea in abatement. Or he may sue out a writ of habeas corpus, either in the State or Federal courts, if he is detained by the State authorities, or in a Federal court, if he is in the hands of Federal officers. If the State courts should refuse to discharge him on his plea in abatement or on habeas corpus, he may then sue out a habeas corpus from a Federal court. It is to be remembered, however, that this immunity does not extend to one who does not depart after he has reasonable time or opportunity to do so. If after this he remains, he waives his privilege and is subject to the jurisdiction of the courts in the State where he is found for all purposes. This immunity from prosecution attends him not only in the State to which he is brought, but also in all States and Territories through which he

must pass while returning with reasonable diligence to the State or country from which he is brought.[54]

Reading together the decisions of the Supreme Court of the United States in ex parte Royall and U. S. vs. Rauscher, it will be seen that any federal judge might and should discharge on habeas corpus a prisoner whom the State courts refused to discharge after he had been discharged from prosecution on the charge on which he was extradited. As the Federal courts will afford this protection where the State courts refuse it, there is no practical difficulty in securing it.[55]

A person extradited from one State to another may be tried in the demanding State for any offense whatever, whether it be named in the warrant of extradition or not.

This was for many years a disputed question in our law, some of the courts holding the affirmative,[56] and others the negative,[57] of this proposition. But the question must be considered as finally put at rest by the decision of the Supreme Court of the United States in Lascelles vs. Georgia, 148 U. S., 537, affirming the doctrine above stated.

In interstate extradition a person may be extradited for any criminal offense whatever, however

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[54] 2 Am. Cr. Reports, 212; U. S. vs. Rauscher, 119 U. S., 407; State vs. Vanderpool, 39 Ohio St., 273; Blandford vs. State, 10 Tex. Ct. of App., 627; Com. vs. Hawes, 13 Bush. (Ky.), 697; ex parte Royall, 117 U. S., 251.

[55] Hawley Internat. Extrad., 12.

[56] State vs. Stewart, 60 Wis., 587; re Miles, 52 Vt., 609; Dow's case, 18 Pa. St., 37.

[57] Re Cannon, 47 Mich., 481; Com. vs. Hawes, 13 Bush. (Ky.), 697.

trivial. In international extradition, extradition can only be had for the crimes named in the particular treaty under which extradition is sought.

FORMER JEOPARDY.

If there is a valid law declaring the act to be a crime and the court has jurisdiction over the territory in which the act was committed and it is the proper tribunal to impose the penalty fixed by the law, only one further question arises: Is the respondent subject to the power of the court?

Under some circumstances, as we shall see, although the respondent has committed an act which a valid law declares to be an offense, within the territorial limits of the law punishing it, and he is brought before a court duly authorized to impose the penalty under ordinary circumstances, yet that court will be without jurisdiction if the respondent has once been in jeopardy for the same offense.

No court has jurisdiction to try a person who has once been in jeopardy for the same offense.

Blackstone calls this a universal maxim of the common law of England.[58] It is a principle which is stated in various forms in the constitution of the United States and of the constitutions of the several States, but, in whatever shape it appears, the particular language is to be interpreted according to the principles of the common law.[59] The principles of the common law may best be stated under three heads. 1. A person who has been convicted of an offense is not subject to a second conviction or punishment for that offense. 2. One who has been ac-

[58] 4 Bl. Com., 335.
[59] People vs. Harding, 53 Mich., 481.

quitted[60] of an offense is not subject to be tried again for that offense. 3. One who has been on trial for an offense, on which trial he might have been convicted, is not subject to another trial, either for the offense of which he stood accused, or for any offense of which he might have been convicted upon that trial.

The first general limitation of the scope of the rule under consideration is that it only applies to prosecution by the same sovereignty. It follows from this that a prosecution in one State for a particular offense, whether it be followed by conviction or acquittal, is not a bar to a prosecution by another State or sovereignty based upon the same state of facts.

Again, it is generally held that the same act may amount to two or more distinct crimes, and, in such a case, the rule as to former jeopardy has no operation. Thus it is generally, but not universally held, that the same act may be tried and punished, both as a crime, under the State law, and also as an offense under a city ordinance.[00] And so, also, if the same act constitutes two different crimes, as, for instance, if one maliciously burns the dwelling house of another, which amounts to arson, if the burning occasions the death of a human being in the building, the person

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[60] Jeopardy attaches when a jury has been empaneled and the unnecessary discharge of the jury without the consent of the accused operates as an acquittal. Com. vs. Fitzpatrick, 7 Am. Cr., 199; Hilands vs. Com., 6 Am. Cr., 339. And some authorities hold that a trial on which there should have been an acquittal on the merits is equivalent to an acquittal. State vs. Moore, 41 Wis., 684; 2 Am. Cr., 64; People vs. Gordon, 40 Mich., 716; 3 Am. Cr., 26.

[00] Hughes vs. People, 8 Colo., 536; 5 Am. Cr., 80. For a collection of cases on this subject, see note to State vs. Sly, 2 Am. Cr., 51.

setting fire to the building is also guilty of the crime of murder, and may be prosecuted for both offenses.[61]

It has been disputed whether or not, in a case where the accused is subject to more than one prosecution, he may, after acquittal on the first, be prosecuted upon the second charge. Upon reason and authority, it is clear that the principle as to former jeopardy requires that when once the issue of fact involved has been regularly tried, and the defendant has been acquitted, this should be accepted as a final judicial finding and determination of the question of fact in favor of the prisoner.[62]

The rule of former jeopardy cannot be invoked in behalf of one who has fraudulently caused himself to be prosecuted before a tribunal where he expects to receive a less penalty than should be awarded, or where he expects to secure an acquittal by fraud, or where he gets himself tried for an offense less in degree than he should properly be prosecuted for.

This exception is founded upon that principle of the law which declares that no man shall gain any advantage by his own wrongful and fraudulent conduct, a principle to which we have adverted elsewhere. Subject to the exceptions stated, the rule, as we have stated it, is strictly enforced by the courts.

The first proposition which we have stated, that after regular conviction no person is subject to trial or punishment the second time, may be illustrated by the following case: In a case where the law provided that the convict might be sentenced to fine or

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[61] Conviction of larceny held no bar to a prosecution for burglary on the same facts. State vs. Martin, 4 Am. Cr., 86. But a conviction of a breach of the peace is a bar to a prosecution for an assault and battery on the same facts. Com. vs. Hawkins, 1 Am. Cr., 65.

[62] State vs. Colgate, 31 Kan., 511; 5 Am. Cr., 71.

imprisonment, and he was sentenced by the court to both fine and imprisonment, he paid his fine and claimed that he was not subject to imprisonment. Thereupon the trial court undertook to recall the first sentence, and to impose a sentence of imprisonment only, and under this latter sentence he was imprisoned. He was discharged from this imprisonment by the Supreme Court of the United States upon the ground that having once paid the penalty of the law the court had no jurisdiction to award a second judgment.[63] In this connection it may be said that it is a general rule that a trial court may, at the same term, recall the first sentence and impose another, so long as no part of the sentence has been carried into effect,[64] but the moment that any part of the first sentence has been carried into effect the jurisdiction of the court over that offense has gone forever.[65]

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[63] Ex p. Lange, 18 Wall. (U. S.), 163.
[64] Lee vs. State, 32 Ohio St., 113; 3 Am. Cr., 376.
[65] 1 Bish. Cr. Proced., 877, and cases there cited.

PRINCIPALS AND ACCESSORIES.

CHAPTER III.

PRINCIPALS AND ACCESSORIES — ATTEMPTS — CONSPIRACIES — TREASON.

Comparatively few crimes are the product of a single will. Usually a crime is the result of the operation of several wills, but frequently the persons consenting to the crime occupy different relations to it. They stand in different degrees of proximity and responsibility to it, and these degrees of proximity and responsibility to it and for it are indicated by the division of criminals, in cases of felony,[1] into principals and accessories. So far as principals in the first degree, principals in the second degree and accessories before the fact are concerned, there does not seem to be any very sound reason for distinguishing between them, or for asserting any difference in their degrees of guilt. For, as we shall see, either of these must be an efficient factor in the crime. The distinction between these three classes has been abolished in most of the states,[2] but it is nevertheless necessary that, in a book of this character, we should explain briefly the nature of the distinctions which the common law established between them.

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[1] In treason and misdemeanors all who are guilty at all are guilty as principals. The discussion as to principals and accessories applies only in cases of felony.

[2] See People vs. Spies, 7 Am. Cr., 570.

A principal in the first degree is either, one who being absent, commits the crime through the means of an innocent agent, or, who is present and personally commits it, or personally takes part in its commission.

By an innocent agent is meant one who does not know that he is assisting in the perpetration of a crime, or, if he does, is yet, by reason of a lack of criminal capacity or because his will is overcome by threats and intimidation, not legally responsible for the crime. The doctrine that one who commits a crime by the hand of an irresponsible agent is a principal in the first degree grows out of the self-evident principle that there must be some one who is responsible for every crime, and such is the situation of a principal in the first degree. But where one, being absent, procures a crime to be committed by a guilty agent — that is, by one who is criminally responsible for it — it is the guilty agent who is principal in the first degree, and, as we shall presently see, the one who procures the act to be done is called an accessory before the fact.

A principal in the second degree is one who shares the guilty purpose and, while not taking part in the actual commission of the crime, is present, encouraging, assisting, or abetting its commission, or is so near, as to be of material service to the criminal at the very time of the commission, and is there for that purpose.

There must be a principal in the first degree before there can be a principal in the second degree. It is essential that a principal in the first degree should have a criminal intent, or, as it is expressed above, a

guilty purpose. Therefore, where the one who actually does the criminal act which would make him principal in the first degree if he had a criminal intent, has in fact no criminal intent, the one who aids and abets, having himself a criminal purpose, is not a principal in the second degree because he does not, in the language of the definition, share in a guilty purpose.

Two men agreed to commit statutory burglary together. One of them, the only one who actually entered the building, did it simply for the purpose of entrapping the other. He went into it, with the sanction of the persons whose building was to be robbed, for this purpose. As he had no criminal intent, he was not guilty of burglary, and since he was not guilty of burglary, neither was the one who aided and abetted.[2]

An accessory before the fact is one who procures, advises, commands, or solicits a crime to be committed by a guilty agent, or, furnishes aid in advance towards its commission, but is not present when the crime is committed, and does not, at that time, aid or abet its commission.[3]

The thoughtful reader will readily see that when it is necessary to determine in what relation an accused person stands towards a crime the two facts to be inquired into are these: Where was the accused when the crime was committed? What part did he take in its commission or in procuring it to be committed? When these two matters of fact are determined the principals laid down will suffice to determine in which class he must be placed.

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[2] State vs. Hayes, 16 S. W. Rep., 514.
[3] People vs. Lyon, 5 Am. Cr., 10.

Principals in the first degree must always commit the crime itself, either personally or by the instrumentality of an innocent agent.

Principals in the second degree do not commit the crime itself, but encourage, aid, abet or assist its commission, at the very time it is being committed.

Accessories before the fact are not present when the crime is committed, and do not at that time aid, assist, encourage or procure its commission, but have done some or all of these things in advance of the actual commission of the crime.

A few illustrative cases will suffice to show the scope of these legal theorems:

In Coms. vs. Hill, 11 Mass., 136, it appeared that the prisoner gave a counterfeit bank note to a boy of eleven years of age, and told him that if he would get it changed he would give him half. The boy did so, not knowing that the bill was counterfeit. It was held that the prisoner was a principal in the first degree.

In Gregory vs. State, 26 Ohio St., 510; 2 Am. Cr., 146, the prisoner was charged with uttering and publishing a forged promissory note.

It appeared that the prisoner had some business with the man, whose name was forged to the note, in the course of which the latter had to sign some papers. As he was unable himself to write his name, he called his daughter to do it for him. While her father's attention was diverted the prisoner took the opportunity to get the daughter to sign his name to this note, representing to her that it was one of the papers which her father had to sign. It was held that the respondent was guilty of forgery, and that the daughter, being an innocent instrument, he was a principal in the first degree.

In Regina vs. Mitchell, 2 Moody, 120, it appeared that the prisoner, intending to kill a child, gave poison to the child's nurse, telling her it was proper medicine for the child. The nurse took the poison home with her, but did not intend to administer it. She left it exposed, and her little son got hold of it and gave it to the child, causing its death. It was held that as the poison was administered to the child by an innocent agent, and while the prisoner still intended to kill the child, she was guilty as principal in the first degree.

In Doan vs. State, 20 Ind., 495, the respondent was indicted for statutory burglary. The proof showed that while two other persons broke and entered the storehouse the prisoner remained outside, watching and ready to render them assistance in case it might be required. He was held to be principal in the second degree.

In State vs. Hamilton, 18 Nev., 386, five persons conspired to rob a stage. In pursuance of the agreement one of them lighted a fire on a mountain forty miles distant from the scene of the attempted robbery, in order to give the others notice of the approach of the stage. The other four met the stage and attempted the robbery. The one who lighted the fire was held to be a principal in the second degree.

In Breese vs. State, 12 Ohio St., 140, it was held that where one of two persons, in order to commit a burglary, decoyed the owner of the house to a distant place and kept him there until the burglary had been committed by the other, he was a principal in the second degree.

In Com. vs. Bowen, 13 Mass., 356, it appeared that two prisoners were confined in adjoining cells within hearing of each other. One advised the other to commit suicide, which he did, and it was held that the

adviser was guilty of murder as a principal, and the same doctrine was held in Regina vs. Allison, 8 Car. & P., 418.

If, before the birth of a child, a person advises the mother to murder it when born, and she does so, the adviser is an accessory before the fact in the murder.[4]

There is a case in which it appeared that a household servant joined in a plan to rob his master's house. In pursuance of the plan he let the man into the house and concealed him until the next morning when the servant went away. After his departure the concealed accomplice stole the householder's money, and it was held that the thief was principal in the crime and that the servant was accessory before the fact.[5]

The most important questions which have arisen with regard to persons who have been charged as accessories before the fact are cases in which the question has been raised whether or not the alleged accessory before the fact had such an intent as made him an accessory to the crime which was actually committed, he not having advised or procured the commission of that identical crime.

In our previous discussion of the question of criminal intent, we have had occasion to point out that a man may be guilty of a crime while not intending to commit that particular crime.[6]

The principles which were then explained apply with equal force to a case where a man aids or abets the commission of a crime in which, however, he is not to be personally concerned, but which is to be consummated by the hand of another. One who

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[4] Parker's case, 2 Dy., 186.

[5] Regina vs. Tuckwell, Car. & M., 215.

[6] See p. 33.

would be accessory before the fact to a particular crime which he designs shall be committed is equally accessory before the fact to whatever crime is committed as a natural and probable, or, at least, not an unnatural and improbable, result of the crime first contemplated. Therefore it has been held that if B. procures C. to commit a robbery and C. kills A. to conceal the robbery, B. is guilty as accessory before the fact to the crime of murder.[7] In another case an accessory before the fact to a burglary was held not to be guilty as accessory before the fact to the murder of a policeman, committed by the principals in the burglary, while engaged in taking the stolen goods into a pawn shop immediately after the burglary, and which disposition of the goods was a part of the original scheme.[8] These two cases illustrate in a very strong light the thought that every case must be decided upon its own facts. While courts agree upon the general principle they differ widely in its application. It is unnecessary to pursue this subject further.

ACCESSORIES AFTER THE FACT.

One who receives, harbors, conceals, or otherwise gives personal assistance to one who has committed a felony, knowing that he has committed the felony, with the intent, that is, for the purpose, of assisting the felon to elude justice, is an accessory after the fact, to that felony.

The rule of law which punishes accessories after the fact springs from a pervading theory of our law that every citizen is a member of the body politic, and as such his duty requires that he should assist, and not hinder, the body politic in its efforts for the common

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[7] State vs. Davis, 87 N. C., 514.

[8] Lamb vs. People, 96 Ill., 73.

weal. Criminal laws are based upon the theory that the act which is punishable as a crime is not merely a wrong to an individual, but it is especially an injury to the commonwealth. There is no philosophical, or, perhaps it might be better to say natural, distinction between many acts which our law regards simply as torts — that is, wrongs to individuals — and other acts which are punished as crimes — that is, injuries to the commonwealth. Why the common law should have made it felony punishable with death to steal in a shop property of the value of five English shillings, and should have regarded as a mere civil trespass the act of cutting down a tree, for which no price would have been accepted by the owner, is not clear. The authors have carefully and sedulously studied and thought to try and find some principle, by reason of which the law should, even now, punish stealing to the value of an English shilling in a shop by imprisonment for five years, while an unprovoked and unjustified assault and battery, which may result in a thousand times more pecuniary damage, to say nothing of the personal indignity, cannot be punished (in some jusidictions) by a greater penalty than imprisonment for more than ninety days. The authors have not been able to suggest a satisfactory answer to the problem and can only say that the criminal law is an arbitrary system. But they suggest these ideas in the hope that some reader may sometime think that our criminal codes need a thorough and philosophical revision and undertake the work.

The reason given why some acts were considered crimes, rather than torts, by the common law — as, for instance, larcenies — is because the thief's intention to steal was aimed at the community at large, and not at any particular individual. Usually the thief has no malice against the individual whose property he

steals, but he takes the property without any consideration of who may be the owner. Whereas, in any ordinary civil tort, there is more likely to be a conscious purpose of doing wrong to a particular person. But this suggestion, when critically examined, is lame and impotent so far as furnishing an adequate explanation why some acts are crimes (i. e., punished by the State, in a proceeding instituted and carried on by the State at its own expense, by its own officers and in its own name), while other acts, of equal malignity, injury and wrong, must be prosecuted by individuals at their own cost or not at all. Possibly the final solution will be the adoption of the principle that the State owes justice to every citizen, and should itself secure it to him. Such was the theory of Jeremy Bentham, one of nature's great quarry masters, one of those who hew out in advance, from the still undisturbed quarries of truth, material which succeeding generations must work up. The continual increase in the number of statutory crimes,[9] and the substitution of public for private prosecutors,[10] go to

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[9] It needs no enumeration to sustain the proposition that statutory crimes are being multiplied. This tendency has been deplored by many old-fashioned lawyers and judges, but it is not to be doubted that our criminal code will continue to draw within its domain acts which the law at present regards simply as torts, and who shall say that this is not a beneficent tendency when he recalls some of the effects of modern legislation. The criminal offenses of abortion, embezzlement, false pretenses, bigamy, adultery, seduction, malicious trespass, offenses involved in violation of the liquor laws, violation of statutes against monopolies, and many others, are all products of comparatively modern legislation. There are not many who would be hardy enough to say that these crimes should be wiped from our statute books.

[10] At the common law prosecutions for criminal offenses which involved injuries to individuals, were usually set in motion by the wronged individual, who was called the prosecutor, and who was responsible for the costs of

show that the tendency of the world is in that direction.

Returning from our digression to the subject under consideration, it must be said that our law regards it as the duty of every citizen to use his efforts to suppress crime and bring criminals to justice. And while it is rare that mere omission to perform this duty is criminally punishable, an active interference to enable the wrong-doer to escape justice is always criminally punishable, and this is the crime of the accessory after the fact.

Any act which assists the felon to escape justice, and is done for that purpose, is sufficient to constitute one an accessory after the fact.[11] Giving false testimony, or procuring it to be given, in the felon's behalf is within the rule.[12] But the crime must have

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prosecution in case of an acquittal. He was entitled to be represented by his own counsel on the trial. But he was not entitled to bring a civil action for his private injury until he had fulfilled his duty of prosecuting for the public wrong. This is now all changed. As was said in one case: "Public prosecutions for offenses are not in this country, as in England, left to be instituted or conducted by private parties, and at their own risk as to costs. We have public prosecutors legally bound to institute and conduct such prosecutions, and to see that grave crimes do not go unpunished" — see Boston, etc., vs. Dana, 1 Gray, 83, where the question is fully discussed, and the English rule of suspension of the remedy denied to be applicable in Massachusetts — and this seems to be the more general American doctrine. And notwithstanding the doubt expressed by Mr. Bishop (1 Bish. Cr. L., secs. 337 and 338), I am entirely satisfied with the reasoning of the case last cited, by Christiancy, J., in Hyatt vs. Adams, 16 Mich., 180. But see White vs. People, 81 Ill., 333.

[11] Wren vs. Com., 26 Gratt., 952; Tully vs. Com., 11 Bush, 154.

[12] Blakely vs. State, 24 Tex. App., 616.

been fully perpetrated,[13] and the one rendering assistance must have actual knowledge of the fact.[14]

As we have seen before, a wife is not guilty as accessory after the fact in assisting her husband to escape justice.[15]

ATTEMPTS.

An attempt to commit a crime, whether the crime be a felony or a misdemeanor, is a misdemeanor, unless made a felony by statute.

A great many attempts to commit crime have been made specific crimes by statute. Thus an assault with intent to kill and murder is an attempt to commit murder; an assault with intent to rob is an attempt to commit the crime of robbery; an assault with intent to ravish is an attempt to commit rape, etc.

Besides those attempts which are in the list of specific and enumerated crimes, the law punishes every attempt to commit a crime by whatever means it is sought to accomplish the purpose. An attempt to commit a crime, where not punished by statute as a specific offense, is a misdemeanor at the common law, whatever may be the grade of the crime which is attempted.[16]

A mere intent to commit a crime is not punishable by law. The wicked and malevolent purpose entertained does not become punishable by human law until it finds expression in some act, by means of which it is sought to accomplish the purpose. But

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[13] Harll vs. State, 39 Miss., 702.
[14] State vs. Empey, 79 Iowa, 460.
[15] Ante, p. 19.
[16] Rex vs. Broderick, 7 C. & P., 795; Smith vs. Com., 54 Pa. St., 209.

whenever an act is done with the intent to effect the criminal purpose, the act and intent together are brought within the domain of the criminal law as a criminal attempt.

The act becomes punishable because of the intent and purpose with which it was done.[17]

To be punishable as an attempt, an act must be a direct step towards the commission of a particular crime.

By this proposition it is intended to draw attention to the principle that a mere preparatory act, not in itself wrongful or injurious, is not a criminal attempt. For instance, it has been said that merely starting towards the place where the crime is to be committed with the intention of committing the crime is not an attempt.[18] And so merely buying matches or kerosene oil for the purpose of committing arson does not amount to an attempt to commit arson. A resident of Alaska who ordered whisky shipped to him in Alaska was held not guilty of an attempt to bring the whisky into Alaska.[19] The reason is obvious. No force is set in motion which, if not interrupted, would accomplish the criminal purpose. In both cases there must be a further exercise of the will and a further act before any step is taken in the path directly leading to the commission of the crime. The cases under this head are not numerous, but the principle, as stated, is well established.

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[17] Making a false key to the lock of a warehouse for the purpose of entering the warehouse and stealing the goods stored there is an attempt to commit statutory burglary. Griffin vs. State, 26 Ga., 493.

[18] Reg. vs. Meredith, 8 C. & P., 589.

[19] U. S. vs. Stephens, 12 Fed. Rep., 52.

In every criminal attempt there is a definite intent to commit the certain specific crime charged to have been attempted.

This principle is best illustrated by the decisions in cases of assaults with intent to murder, assaults with intent to rob, assaults with intent to commit rape, and the like, which, as we have seen, are properly classified as attempts. Thus, on a charge of assault with intent to kill and murder A. there must exist an absolute purpose to kill A. A general intent to do A. serious bodily harm from which death may result is not sufficient. It is true that the intent may be deduced from the act done, but the intent cannot be presumed or ascribed as a matter of law; it must be ascertained and found as a specific fact. The doctrine that a man is presumed to intend the natural consequences of his act is a rule of evidence merely, and, unless a specific intent to kill exists, the crime is not committed.

In the next place the intent must be specifically to kill A. Therefore if the accused shoots at B., intending to kill him, and accidentally wounds A., this is not an assault with intent to kill A., because the specific intent to kill A. did not exist.[20]

And in the third place there must be an intent to murder — that is, the assault must be committed under such circumstances that if death had resulted the crime would have been murder. But it matters not whether it would have been murder in the first or second degree. If the crime would have been no more

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[20] But see contra Dunaway vs. People, 110 Ill., 333; 4 Am. Cr., 60; State vs. Gilman, 69 Me., 163; 3 Am. Cr., 15.

than manslaughter if death had resulted, the intent to commit murder did not and could not have existed.

So in assault with intent to commit rape, there must exist an absolute purpose to accomplish the crime by force and against the utmost resistance of the victim; that is, of course, where the woman is above the age of consent. Force is not a necessary ingredient of the crime of rape where the woman is under the age of consent, and in such a case it is not necessary that force should be intended. In such a case the mere intent to have carnal intercourse is a sufficient intent.

To solicit or counsel another to commit a crime is an attempt to commit the crime.

If the person solicited or counselled refuses, nevertheless a criminal attempt has been committed, because a persuasive force has been exercised, which, if it had the necessary and desired effect, would have accomplished the commission of the crime.[21] If by means of counsel or persuasion one is actually induced to commit a crime, the one who counsels or persuades to its commission is guilty of the crime, as an accessory before the fact, or in some cases as principal.[22]

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[21] Com. vs. Randolph, 146 Pa. St., 83; Com. vs. Flagg, 135 Mass., 545; State vs. Hayes, 78 Mo., 307; Griffin vs. State, 26 Ga., 493. The courts are not agreed upon this question and it may be said that the weight of authority is that a solicitation to commit adultery is not a criminal attempt. State vs. Butler, 8 Wash., 194; 9 Am. Cr., 661; Cox vs. People, 82 Ill., 191; 2 Am. Cr., 329. For a husband to attempt by threats of violence to induce another to ravish his wife is an attempt on the part of the husband to commit rape. State vs. Dowell, 106 N. C., 722; 8 Am. Cr., 681.

[22] Ante, p. 81.

One cannot be charged with an attempt to commit a crime where the facts are such that it is impossible, as matter of law, that the act done could accomplish a crime, or be one step in the chain of events by which a crime may be effected.

One may be guilty of a criminal attempt, although the facts are such that it is impossible, as matter of fact, that the crime intended could be committed.

There is often difficulty in determining by which of these rules a given case must be determined.

An examination of some of the adjudicated cases will illustrate when it is impossible to commit a meditated crime as a matter of law, and when it is impossible as a matter of fact. In the former class of cases there can be no criminal attempt; in the latter class there may be.

In these courts in which the common law rule is adhered to, that there is a conclusive presumption that a boy under the age of fourteen years cannot be guilty of rape, it is agreed that he cannot be guilty of an attempt to commit rape,[23] because, as a matter of law, it is impossible that he should attempt to commit the crime which the law conclusively presumes he cannot commit.[24]

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[23] Reg. vs. Phillips, 8 C. & P., 736; People vs. Randolph, 2 Park. Cr., 213; State vs. Handy, 4 Harr. 506.

[24] These decisions must of course be limited to cases where it is charged that it was the purpose of the boy himself to have sexual connection with the woman assaulted. A boy under fourteen or even a woman may be guilty of rape where they are present at the crime and actively assist another person to accomplish the crime. In this manner a husband may be guilty of rape on his own wife. In some courts the common law presumption that a boy under fourteen cannot be guilty of rape is discarded. Com. vs. Green, 2 Pick, 331; Williams vs. State, 14 Ohio, 222. In other courts it remains as a prima facie presumption. Gordon vs. State, 93 Ga., 531; 9 Am. Cr., 444.

In a case where the prisoner intended, and seemed to attempt, to commit burglary, it was held that he was not guilty of the crime, because, since his confederate entered the premises with the consent of the proprietor, the law would not ascribe the guilt of burglary to the acts done, although this was due to a fact of which the respondent was ignorant.[25]

And in another case it was held that the accused was not guilty of the intent to defraud necessary in the crime of obtaining money by false pretenses, because, by reason of a rule of law of which the respondent was ignorant, it was in the particular case impossible to defraud.[26] Neither of these two latter cases are cases of attempts, but both of them turn upon the point that the crime could not be accomplished, because, although the end sought was accomplished, it turned out not to be a crime.

It may be said, therefore, that if, when the purpose intended is accomplished, there is no crime, there is no attempt to commit a crime in trying to effect the purpose.

On the other hand, if the purpose intended, if accomplished, would amount to a crime, to do an act toward effecting the purpose is a criminal attempt, even though, by reason of some fact unknown, it is impossible to perpetrate the crime attempted.

The most familiar illustration of this proposition is found in the cases which hold that one is guilty of an attempt to commit larceny from the person who puts his hand into another's pocket with intent to steal,

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[25] People vs. Collins, 55 Cal., 185, Supra cit.
[26] State vs. Asher, 55 Ark., 427, Supra cit.

and finds the pocket empty.[27] In such a case, the crime of larceny from the person could not be committed, because there was nothing in the pocket to steal. But the act of putting the hand into the pocket itself being unlawful, and the intent being to commit a larceny, it is a criminal attempt, even though, by reason of the facts in the particular case, the crime could not be committed. So it is also held that the crime of attempting to procure an abortion may be committed, even though the woman on whom the crime is attempted is not pregnant, although mistakenly believed to be so.[28]

The distinction, therefore, which is to be drawn between the two classes of cases is this:

Where the end sought would not, if accomplished, be a crime, there is no attempt to commit a crime; where the end sought would, if accomplished, be a crime, there is an attempt to commit a crime.

CLASSIFICATION OF CRIMES.

The oldest and one of the most important divisions of crimes is into treason, felony and misdemeanors.

Treason is in reality an aggravated felony, and is discussed more fully as a specific offense.[29]

Felony is defined by Blackstone to be an offense which occasions a total forfeiture of either lands or goods, or both, at the common law, and to which capital or other punishment may be superadded according to the degree of guilt.[30]

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[27] Com. vs. McDonald, 5 Cush., 365; State vs. Wilson, 30 Conn., 500.

[28] Reg. vs. Goodhall, 2 Cox C. C., 40; Queen vs. Whitchurch, 8 Am. Cr., 1.

[29] See post, title Treason.

[30] 4 Blk. Com., 95.

Capital punishment was so generally inflicted on those guilty of a felony that it became the accepted law that an act punishable by death was a felony.

In this country there is no forfeiture of either lands or goods for the commission of a crime, so that the test given by Blackstone cannot in the first instance be of much assistance. The general rule in this country is that those offenses which under the English common law were felonies are such under our law, even though they may not be punishable by death or by a forfeiture of lands or goods. Many of the criminal statutes expressly provide that certain acts shall be felonies.

In the absence of a statutory definition, a felony may be defined to be a crime which the statute declares to be a felony, or, which is punishable with death, or, which occasioned under the old English law a total forfeiture of either lands or goods.

In most of the States statutes have been passed defining what shall constitute a felony. As a general rule these statutes provide that all crimes which are punishable with death, or by imprisonment in the State's prison, are felonies.

Misdemeanors include all offenses less than a felony.

The distinction between felonies and misdemeanors, so far as the forfeiture of lands and goods is concerned, has been abolished, but the distinction still remains and is important in some instances in the criminal law. The following are a few instances in which the distinction is made:

In the law of arrest an officer has a right to arrest, without warrant, one whom he has good reason to believe guilty of a felony. If the officer acts in good

faith and on reasonable ground, he is justified in making an arrest without warrant, even though it should afterwards appear that no felony has been committed.[31] The right to arrest, without warrant, upon reasonable suspicion of a felony is absolute, and not dependent upon the probable escape of the suspected person before a warrant can be procured.[32]

In case of misdemeanor an arrest cannot be made without a warrant, except in the case of breaches of the peace committed in the presence of the arresting officer.[33]

So, also, there are decisions that an officer seeking to arrest a felon who refuses to stop when required to, but continues his flight, has a right to kill to prevent the felon's escape, if he cannot otherwise take him. But this right does not exist in the case of misdemeanor.[34]

In the prosecution of crimes there is sometimes a different procedure in the case of felonies and misdemeanors. For example, in some States a prosecution for a felony is by an indictment, and of a misde-

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[31] McCarthy vs. D. E. Armitt, 90 Pa. St., 63; State vs. Grant, 70 Mo., 236.

[32] Rohan vs. Sawin, 5 Cushing, 281; Holley vs. Mix, 3 Wend., 350.

[33] In the case of People vs. Haug, 68 Mich., 549, the court says: "Under our system we have repeatedly decided in accordance with constitutional principles, as construed everywhere, that no arrest can be made without warrant, except in cases of felony or in breaches of the peace committed in the presence of the arresting officer. This exception, in cases of breaches of the peace, has only been allowed by reason of the immediate danger to the safety of the community against crimes of violence, and it is confined, even in such cases, to instances when the violence was committed in the presence of the officer.

[34] Brooks vs. Com., 61 Pa. St., 352; see post Homicide, 000; Jackson vs. State, 5 South Rep., Miss., 690; Lander vs. Niles, 3 Oregon, 35.

meanor by an information. So there is in some jurisdictions a peremptory challenge of jurymen on the trial of a felony, which is not permissible on the trial of a misdemeanor.

For the purpose of this book we shall classify crimes as follows:

Crimes against the government, against the person, against the dwelling, against property, against public health, saftey, morals and peace, and against the law of nations.

CONSPIRACY.

Conspiracy is the corrupt agreeing together of two or more persons, by concerted action, to commit a crime, or to do something otherwise unlawful, either as a means or an end.

This is an elaboration of the definition of the crime of conspiracy given by Mr. Bishop, which is the clearest and most satisfactory definition of this crime, which is to be found among the existing text writers. We have added to Mr. Bishop's definition the words, "to commit a crime," in order to simplify the discussion. To conspire to commit a crime, whether a felony[1] or misdemeanor,[2] is always a criminal conspiracy, and it is not necessary to elaborate this feature of the law of conspiracy. With this branch

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[1] Frank vs. State, 27 Ala., 37; State vs. Chapin, 17 Ark., 561; State vs. Shields, 45 Conn., 256; Scudder vs. State, 62 Ind., 13; Miller vs. Com., 78 Ky., 15; People vs. Pool, 27 Cal., 572; State vs. Murray, 15 Me., 100; Com. vs. O'Brien, 12 Cush., 84.

[2] State vs. Norton, 3 Zab. (N. J.), 33; State vs. Cardoza, 11 S. C., 196; State vs. Spalding, 19 Conn., 234; State vs. Younger, 1 Dev. (N. C.), 357; Williams vs. Com., 34 Pa. St., 178; Alderman vs. People, 4 Mich., 414; State vs. Keach, 40 Vt., 113.

of the law out of the way, it then becomes necessary to enquire what other confederacies are criminal conspiracies. A common definition runs as follows: "A confederacy of two or more persons to accomplish some unlawful purpose, or a lawful purpose by some unlawful means." Still other definitions are to be found in the text books and reports.

In the word unlawful every crime is necessarily included; that is, everything which is punishable as a crime, whether done by a single individual, or by a number. But we have eliminated conspiracies to commit a crime from the meaning of the words, otherwise unlawful, by putting conspiracies to commit a crime in a class by themselves. We are now to enquire what other conspiracies are punishable criminally, and herein lie the chief difficulties of the law of criminal conspiracy.

Most combinations to accomplish injurious and oppressive acts against the lawful rights of the public or of individuals, are criminal conspiracies, although such injurious and oppressive acts performed by a single individual would be no more than a civil tort.[3]

But this language must be taken with this qualification that the injurious and oppressive act must be of a nature which becomes especially injurious and oppressive by reason of the combination of numbers in bringing about the evil result. To combine to commit an injurious act, the evil consequences of which are not aggravated, or perhaps, at the least, are not more difficult to contend against, by reason of the numbers engaged, is not a criminal conspiracy. The student must not run away with the idea that every combination to commit an actionable tort is a criminal conspiracy. For instance, it is an action-

[3] State vs. Rowley, 12 Conn., 101.

able tort to go on to a man's land and cut down a tree, but a confederacy or conspiracy to do this would not be punishable criminally, because there is no aggravation in the wrong by its being done by a number instead of by an individual.[4]

It is an actionable tort to falsely accuse a merchant of cheating in his business by using false weights and measures, but it is not criminal for a single individual to make such an accusation falsely. But if a number conspire to spread such false accusations against a merchant, this is a criminal conspiracy, because the evil consequences are greatly aggravated by a number acting in concert, and also, because it is much more difficult for the injured person to contend against false reports spread by a number than against a false report for which a single individual is responsible.[5] The English criminal law commissioners said: "The general principle on which the crime of conspiracy is founded is this: That the confederacy of several persons to effect any injurious object creates such a new and additional power to cause injury as requires criminal restraint; although none would be necessary, were the same thing proposed, or even attempted to be done, by any person singly."[6] The reasons for this will so readily occur to the thoughtful student that it is not worth while to rehearse them.

The wicked agreement is the gist of the offense of conspiracy and it is not necessary that an overt

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[4] Rex vs. Turner, 13 East., 228; State vs. Straw, 42 N. H., 393.

[5] Wildee vs. McKee, 111 Pa. St., 335.

[6] Cited 2 Bish. Cr. L., 181. See also Com. vs. Judd, 2 Mass., 229; Twitchell vs. Com., 9 Barr., 211; State vs. Burnham, 15 N. H., 396.

act should be done to accomplish the purpose of the confederacy.[7]

This is the way in which the law is commonly stated, but there are cases which have held the contrary doctrine.[8]

And while the law is generally, if not universally stated as we have stated it, with regard to the necessity of an overt act, it must be said that it would be difficult to find a case in which there has been a prosecution for criminal conspiracy where no act was done toward effecting the purpose of the combination.

At least two persons must share the guilt of a criminal conspiracy.[9]

For this reason it has been determined that a husband and wife cannot be guilty of a criminal conspiracy, because in law husband and wife are one,[10] and perhaps, also because by reason of that doctrine of the law that what the wife does of a criminal

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[7] U. S. vs. Sacia, 2 Fed. Reporter, 754; Landringham vs. State, 1 Am. Cr., 105.

[8] Wolf, 27 Fed. Reporter, 606.

[9] Where two or more persons have combined for the execution of a criminal purpose, all are equally responsible for acts of the others, fairly within the common enterprise, and which might be expected to happen as incidental to the joint enterprise, but not for acts which are not within the joint purpose or combination, or the natural consequence resulting from the attempt to execute the joint purpose. People vs. Knapp, 26 Mich., 122. Thus it was held that where a number, for the purpose of producing a social revolution, conspired to excite workmen into a riot and to kill the authorities of a city, and a murder of a policeman resulted from the attempt to execute such purposes, the conspirators were responsible therefor. Spies vs. People, 122 Ill., 1.

[10] People vs. Mather, 4 Wend., 229; People vs. Miller, 82 Cal., 107.

nature in connection with, or in the presence of, her husband, is supposed to be done under his coercion. For that reason she is generally held to be absolved from the guilt of any crime which she commits in concert with her husband. But a man and his wife may be indicted for a conspiracy into which they entered before they were married;[11] and so, also, a husband and wife may be joined in an indictment for conspiracy with one or more third persons.[12] Since at least two persons must share the guilt of conspiracy, or in other words, must have entered into the wicked agreement, it is a rule of the law that where one of two persons who are charged with a criminal conspiracy is acquitted, the other must likewise be acquitted.[13]

This follows because the acquittal of one of two persons jointly charged with a conspiracy conclusively establishes the fact that there was no such conspiracy as is charged in the indictment. But where two persons are charged with a conspiracy, if one be dead, the other may be tried alone and convicted because in such a case there is no presumption against the guilt of the parties.[14]

Individuals working separately to commit the same crime without concert of purpose are not guilty of conspiracy.[15]

It is essential to the guilt of conspiracy that the alleged conspirators should have "put their heads

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[11] Rex vs. Robinson, 1 Leach C. C., 37.

[12] Com. vs. Wood, 7 Law Rep., 58; Rex vs. Locker, 5 Esp., 107.

[13] State vs. Jackson, 7 S. C., 283; Johnson vs. State, 3 Tex. App., 590; Queen vs. Manning, 4 Am. Cr., 582; State vs. Jackson, 7 Richardson (S. C.), 283; 3 Am. Cr., 50.

[14] People vs. Olcutt, 2 Johns. C. (N. Y.), 301.

[15] Com. vs. Ridgway, 2 Ashm. (Pa.), 247; Reg. vs. Kenrick, 5 Q. B. Div., 49.

together" to effect a criminal purpose. It is not, indeed, necessary that all the conspirators should be animated by the same motive. But it is necessary that they should agree to effect a criminal purpose by their concerted action. There are cases to be found in the books in which different individuals, working separately, have at the same time been engaged in the effort to accomplish the same wrong, as to compass the ruin of some individual, or to block the path of public justice, or to obstruct an officer in the due exercise of a governmental function. In such cases all the evil results of a criminal conspiracy may be attained, yet there is no criminal conspiracy unless the parties concerned have agreed together to effect the result by their concerted action. And because of this doctrine it is also held that where two persons agree that one of them shall commit a crime, but the other is not to do anything in order to effect the criminal purpose, but simply yields his assent and approbation to the commission of the crime, there is no criminal conspiracy, because it is of the essence of the crime that each of the co-conspirators should agree to play some part in effecting the criminal purpose. A man may know of the existence of a criminal conspiracy and approve of the purpose of the conspirators, and yet, unless it is a part of the agreement that he shall take some part in effecting the purpose of the conspiracy, he is not regarded by the law as a co-conspirator.[16] It is not necessary, indeed, that the part which each one shall take in effecting the criminal purpose shall be agreed upon, nor, indeed, is it necessary that the parties should have agreed upon the manner in which

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[16] Evans vs. People, 90 Ill., 384; Miles vs. State, 58 Ala., 390; People vs. Leith, 52 Cal., 251; 2 Bish. Cr. L., 186.

the criminal purpose is to be effected. This may be left to be determined upon at a future time, or it may be agreed that the parties shall act as circumstances may dictate when the hour for action has arrived.

The wickedness, or innocence, of the motive of an alleged criminal conspiracy, must frequently be the test by which it is to be determined whether or not the combination is criminally punishable.

Many acts which are in themselves entirely lawful, if done for a good motive become criminally punishable when done with a wicked and malicious purpose. This proposition (which is especially applicable to the law of conspiracy) was illustrated by Judge Gibson in an elaborate opinion in the following language:[17]

"The unsettled state of the law of conspiracy has arisen, as was justly remarked in the argument, from a gradual extension of the limits of the offense; each case having been decided on its own peculiar circumstances without reference to any pre-established principle. When a combination has for its direct object to do a criminal act, as to procure the conviction of an innocent man (the only case originally indictable, and which afterwards served as a nucleus for the formation of the entire law on the subject), the mind at once pronounced it criminal. So, where the act was lawful, but the intention was to accomplish it by unlawful means, as where the conviction of a person, known to the conspirators to be guilty, was to be procured by any abuse of his right to a fair trial in the ordinary course. But when the crime became so far enlarged as to include cases where the act was not only lawful in the abstract, but was to be accomplished exclusively by the use of lawful means, it is

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[17] Com. vs. Carlisle, Brightly's Rep. (Pa.), 36.

obvious that distinctions as complicated and various as the relations and transactions of civil society became instantly involved; and to determine on the guilt or innocence of each of this class of cases, an examination of the nature and principles of the offense became necessary. This examination has not yet been very accurately made, for there is in the books an unusual want of precision in the terms used to describe the distinctive features of guilt or innocence. It is said the union of persons in one common design is the gist of the offense; but that holds only in regard to a supposed question of the necessity of actual consummation of the act meditated; for if combination were, in every view, the essence of the crime, it would necessarily impart criminality to the most laudable associations." He continues: "It will, therefore, be perceived that the motive for combining, or what is the same thing, the nature of the object to be attained as a consequence of the lawful act, is, in this class of cases, the discriminative circumstance. Where the act is lawful for an individual, it can be the subject of a conspiracy, when done in concert, only where there is a direct intention that injury shall result from it, or where the object is to benefit the conspirators to the prejudice of the public or the oppression of individuals, and where such prejudice or oppression is the natural and necessary consequence. To give appropriate instances respectively referable to each branch of this classification of criminal intention: if a number of persons should combine to establish a ferry, not from motives of public or private utility, but to ruin or injure the owner of a neighboring ferry, the wickedness of the motive would render the association criminal, although it is otherwise where capital is combined, not for the purposes of oppression, but for fair competition with

others of the same calling. So with respect to the other branch: if the bakers of a town were to combine to hold up the article of bread, and by means of a scarcity thus produced, extort an exorbitant price for it, although the injury to the public would be only collateral to the object of the association, it would be indictable; and to one or other of these may the motive in every decided case be traced.

"Thus a combination to marry, under feigned names, was held criminal, because the object was to affect the interest of a particular parish under the poor laws, or to injure an individual by setting up a colorable title to his estate. An agreement between the officers of an army to throw up their commissions simultaneously in a time of danger, between a number to hiss a play, right or wrong, was indictable because there was an unmixed motive of mischief to the public or an individual. So, on the other hand, in a confederacy to raise the price of the funds, to sell bad liquors, to procure the release of a prisoner by entering insufficient bail, the motive is not to prejudice the public or an individual, but undue gain to the confederates or their friends, which is unlawful only in reference to the means used to procure it. I take it, then, a combination is criminal wherever the act to be done has a necessary tendency to prejudice the public, or to oppress individuals by unjustly subjecting them to the power of the confederates, and giving effect to the purposes of the latter, whether of extortion or mischief. According to this view of the law a combination of employers to depress the wages of journeymen below what they would be, if there was no recurrence to artificial means by either side, is criminal." Again he says: "And it is the employment of an engine so powerful and dangerous, that gives

criminality to an act that would be perfectly innocent, at least in a legal point of view, when done by an individual."

STRIKES, BOYCOTTS, AND MONOPOLIES.

The principle which has just been under consideration finds its clearest illustration in conspiracies to raise or depress the rate of wages, or the price of commodities, or to destroy the trade of an individual. Although it has been said that, at common law,[18] a combination of workmen who should agree to demand higher wages, and to quit work in a body, in case their demands were refused, was a criminal conspiracy at the common law, the clear weight of modern authority is against this proposition. And, indeed, bearing in mind the principles which have been discussed, it is difficult to see upon what ground such a combination was ever considered criminal. It is clearly lawful for every man to demand such wages for his labor as he thinks himself entitled to; and it is clearly lawful for him to refuse to work, if his demand is not acceded to. Here is neither an unlawful end nor unlawful means. The definition of the law of criminal conspiracy shows that the combination must intend either to accomplish an unlawful purpose, or to accomplish a lawful purpose by unlawful means. Neither of these elements is found in the case which has been stated, and, therefore, the mere agreement among workmen to quit work in a body, if their joint demand is not acceded to, has none of

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[18] The following English and early American cases sustain this doctrine: Rex vs. Journeymen Tailors, 8 Mod., 10; Reg. vs. Duffield, 5 Cox. C. C., 404. The early American cases: The Philadelphia Boot and Shoemakers' case of, etc.; People vs. Melvin, 2 Wheel Cr. Cas. (N. Y.), 111; People vs. Fisher, 14 Wend. (N. Y.), 9; Yates Sel. Cas. (N. Y.), 111.

the elements of a criminal conspiracy. But let us suppose that the agreement goes further, and involves a purpose to use threats or intimidation against others, who may be willing to take the place of the strikers, and to even actually assault them, such a combination falls clearly within that definition of the law of conspiracy, which defines it as an agreement to accomplish a lawful end by unlawful means. For every man is entitled by law to exercise his own judgment as to for whom, and at what wages, and upon what conditions he will work, and no man, or combination of men, has a right to interfere with his liberty.[19]

But suppose that the agreement to strike for higher wages does not involve threats of intimidation, or assaults, but it is agreed to use argument and persuasion to prevent any other workmen from taking the place of those who quit the employment because their demands for higher wages are not acceded to, and suppose it further involves an agreement not to have any dealings with the employer, who has refused to accede to the demand made upon him, the question then arises whether this additional element makes the combination a criminal conspiracy.

While judges and courts have been somewhat confused upon this question, it seems clear, upon the principles already enunciated, that these elements do not add to the original agreement, anything of an unlawful character. There can be nothing unlawful in a single individual arguing with another, or trying to persuade another, not to supersede him in his employment which he had relinquished, or threatened to relinquish, unless his demands for different terms were complied with. So, there is nothing unlawful

[19] Longshore Pub. Co. vs. Howell, 39 Pac. Rep. (Ore.), 547.

in a body of men, acting in the same manner, and so with regard to what is now generally known as a boycott.[20]

Any single individual may lawfully refuse to have any dealings with any other person for any reason which is satisfactory to himself, and he may lawfully try to persuade others that his reasons for his action are good (if they are not in fact malicious), and that they should act in the same manner.[21]

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[20] The breaking of a contract of employment is an unlawful act, and a conspiracy to break such a contract, it would seem under the principle discussed, would be criminal.

In the recent strike by the American Railway Union, headed by Debs, the court held that the combination to compel a railroad to break its contract with the Pullman Company was a criminal conspiracy. Thomas vs. Cincinnati N. O. & T. P. Ry.; in re Phelan, 62 Fed. Rep., 803, 151 U. S., 1.

[21] The following extracts from comparatively recent decisions illustrate the present tendency of judical thought as to strikes, lock-outs and boycotts. They are selected from cases which will be found in 24 Am. and Eng. Cyc. of Law, under a very interesting and able discussion under the head of "Strikes."

In Rogers vs. Evarts, 17 N. Y. Supp., 264: "The tendency of modern thought and judicial decision is to the enlargement of the right of combination, whether of capital or labor. All restrictions have not been removed; but I am not willing to hold that the combination which appears in this case, in itself, and apart from the methods used, is within the condemnation of the law as it is now interpreted by our courts. Irrespective of any statute, I think the law now permits workmen, at least within a limited territory, to combine together and by peaceable means to seek any legitimate advantage in their trade. The increase of wages is such an advantage. The right to combine involves of necessity the right to persuade all co-laborers to join in the combination. This right to persuade co-laborers involves the right to persuade new employes to join the combination. This is but a corollary of the right of combination."

In People vs. Kostka, 4 N. Y. Crim. Rep., 429, the court said that workmen might co-operate to improve their condition and to increase their wages, and that "they might

Here, again, there is nothing illegal, either in the end, or in the means, and, consequently, there being nothing unlawful, either in the end or in the means, a criminal conspiracy cannot be predicated upon the action of any number of men, combining to effect the same end by the same means.

It is lawful to use argument and persuasion to endeavor to induce others to believe as we do, and to

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refuse to work for less than the price they have jointly fixed, and they may do everything that is lawful and peaceable to secure that price. They may even go to their brethren and beseech them not to work for less than the fixed rate. They may use all fair arguments to prevent acceptance of less than the agreed standard of wages. All this they may lawfully do. Argument, reasoning and entreaty are lawful weapons. But the moment they go beyond these means, and threaten to punish him whom they believe to be their erring brother, threaten him with violence should he stand in the way of their success by accepting a lower rate than that fixed by the co-operators, they bring themselves face to face with the law. Up to the point of threat or violence they may do what they please, and public opinion says, 'Heaven speed you.' But at that point they must stop." The above is a portion of the charge of the court to the jury.

In Com. vs. Sheriff, 15 Phila. (Pa.), 393, it was held that members of a trade union, which by its laws required them to obey its rules and regulations, were not indictable because of the Pennsylvania act of 1872, which makes it lawful for workmen, either as individuals or members of a club, society or association, to refuse to work for any person, whenever a continuance of work would be contrary to the rules of the union, and that such refusal to work shall not subject them to prosecution or indictment for conspiracy. The court, in its opinion, adverted to the elements of force, threats or menace, as raising a different question.

In Crump vs. Com., 84 Va., 927, it was said: "Every man has a right to work for whom he pleases, and for any price he can obtain; and he has the right to deal and associate with whom he chooses; or, to let severely alone arbitrarily and contemptuously, if he will, any and everybody upon earth. But this freedom of uncontrolled and unchallenged self-will does not give or imply a right, either by himself or in combination with others, to disturb, injure or obstruct another, either directly

act from the same motives, and to work for the same ends provided that the end is not unlawful in itself, and the motives are not malicious.

MONOPOLIES.

The principle that combinations to accomplish injurious and oppressive acts against the lawful rights of the public are criminal, is often evidenced in decisions relating to monopolies and trusts.

It is one of the maxims of commerce that "competition is the life of trade." The courts have adopted this maxim and given it effect. The civil courts, for instance, declare contracts which prevent competition in trade to be illegal, and they refuse to enforce them.

An example of the attitude of the courts to monopolies is found in the case of Richardson vs. Buhl in the 77th Michigan, 658, where the court says:

"Monopoly in trade or any kind of business in this country is odious to our form of government. It is sometimes permitted to aid the government in carrying on a great public enterprise or public work under government control, in the interest of the public. Its tendency is, however, destructive of free institu-

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or indirectly, in his lawful business or occupation, or in his peace and security of life."

In People vs. Wilzig, 4 N. Y. Crim. Rep., 403, it was said: "Formerly, a conspiracy of workingmen to raise the rate of wages was criminally condemned as an act injurious to trade or commerce. But, now, it has been legislatively decreed that the orderly and peaceable assembling or cooperation of persons employed in any calling, trade or handicraft, for the purpose of obtaining an advance in the rate of wages and compensation, or of maintaining such rate, is not a conspiracy. This is what the laboring men may lawfully do. What they may not do is to combine together for the purpose of preventing other people from working at prices to suit themselves."

tions, and repugnant to the instincts of a free people, and contrary to the whole scope and spirit of the federal constitution, and is not allowed to exist under express provision in several of our state constitutions. Indeed, it is doubtful if free government can long exist in a country where such enormous amounts of money are allowed to be accumulated in the vaults of corporations, and to be used at discretion in controlling the property and business of the country against the interest of the public and that of the people, for the personal gain and aggrandizement of a few individuals. It is always destructive of individual rights, and of that free competition which is the life of business, and it revives and perpetuates one of the great evils which it was the object of the framers of our form of government to eradicate and prevent. It is alike destructive to both individual enterprise and individual prosperity, whether conferred upon corporations or individuals, and therefore public policy is, and ought to be, as well as public sentiment, against it.

All combinations among persons or corporations for the purpose of raising or controlling the prices of merchandise, or any of the necessaries of life, are monopolies and intolerable, and ought to receive the condemnation of all courts."[22]

A conspiracy, then, to control the sale and price of a commodity by the prevention of free competition, is criminal.

Thus, in the case of People vs. Sheldon, 139 N. Y., 251, on the trial of an indictment for conspiracy to raise the price of coal at retail and to destroy free

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[22] See also People vs. Distilling and Cattle Feeding Co., 41 N. W. Rep., 188; State vs. Standard Oil Co., 49 Ohio St., 137; People vs. North River Sugar Refining Co., 54 Hun., 354.

competition, the court charged the jury that if the defendants entered into an organization agreement for the purpose of controlling the price and managing the business of the sale of coal, so as to prevent competition in price between the members of the organization, the agreement was illegal, and if the jury found this was their intent, and that the price was raised in pursuance of the agreement, the crime of conspiracy was established, and on appeal the Court of Appeals held that this charge was not error.

A Federal statute was passed by Congress in July, 1890, which provides "that every contract or combination in the form of a trust or otherwise for conspiracy to restrain trade or commerce among the several states, or with foreign nations is hereby declared illegal, and every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year or both, such punishments in the discretion of the court."

Under this statute a number of recent attempts to interfere with interstate commerce have been punished.[23]

STATUTES.

The offense of conspiracy is covered by statute in most of the states. There are also Federal statutes, making it criminal for two or more persons to conspire to commit an offense against or defraud the United States, or to conspire to injure, oppress,

[23] Thomas vs. Cin., N. O. & T. Ry. Co., 62 Fed. Rep., 803; in re Grand Jury (D. C.), 62 Fed. Rep., 834; in re Grand Jury, 62 Fed. Rep., 840; U. S. vs. Elliott (C. C.), 62 Fed. Rep., 801.

threaten or intimidate any citizen in the free exercise and enjoyment of any right or privilege secured to him by the constitution or laws of the United States.[24]

MERGER.

In conclusion, it might be well to call the student's attention to the principle that where the act committed is both a misdemeanor and a felony, the lower grade of the offense merges in the higher. At the common law a conspiracy was a misdemeanor, so that where there is a conspiracy to commit a felony which is carried out and executed, the conspiracy merges in the executed felony.[25]

TREASON.

Treason against the United States is where a person, owing allegiance, levies war against them or adheres to their enemies, giving them aid and comfort.[1] At common law there were two kinds of treason, namely, high and petty.

The former consisted in a violation of the allegiance due to the king, such as compassing his death, or comforting his enemies; and the latter consisted in the violation of the allegiance due from an inferior to a superior, as a wife to a husband, or a servant to his master, where the inferior killed the superior. This classification of treason, however, has been abolished and petty treason is now everywhere punished as murder.

In England the statutes specifically enumerate a large number of acts which constitute the offense.

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[24] Rev. Statutes U. S., 5508; Rev. Statutes U. S., 5440.

[25] People vs. Richards, 1 Mich., 216; State vs. Murphy, 6 Ala., 765.

[1] U. S. Const., Art. 3, Sec. 3.

By the federal constitution, one owing allegiance to the United States can be guilty of treason only in two ways: First, by levying war against them; or second, by adhering to their enemies, giving them aid and comfort. There are similar provisions in the statutes or constitutions of the different States.

LEVYING WAR.

To constitute treason by levying war, there must be an overt act of war; a mere conspiracy to overthrow the government does not amount to a treason.

Judge Story, in a charge to the grand jury at the time of Dorr's rebellion, clearly points out the distinction between the levying of war, and a conspiracy to levy war. He says: "A mere conspiracy to levy war, and an actual levy of war, are distinct offenses. To constitute an actual levying of war, there must be an assemby of persons met for the treasonable purpose, and some overt act done, or some attempt made by them with force, to execute, or towards executing, that purpose. There must be a present intention to proceed in the execution of the treasonable purpose by force. The assembly must now be in condition to use force, and must intend to use it, if necessary, to further, or to aid, or to accomplish the treasonable design. If the assembly is arrayed in a military manner, if they are armed and march in a military form, for the purpose of overawing and intimidating the public, and thus they intend to carry into effect a treasonable design, that will of itself amount to a levy of war, although no actual blow has been struck or engagement taken place."[2]

The war must be levied with the intent to over-

[2] 1 Story (U. S.), 615.

throw the government as such. The resistance to the execution of the law of the United States accompanied with any degree of force, if for a private reason, is not treason.[3]

ADHERING TO ENEMIES.

Enemies referred to are the subjects of a foreign hostile power, and not citizens of the United States in rebellion, for they are still citizens and not enemies within the meaning of the constitution.[4]

Adhering to enemies and giving them aid and comfort embraces any act which gives any assistance whatever to the public enemy, unless such act is performed unwillingly, and through well-grounded fear of death in case of refusal.[5]

WHO MAY COMMIT.

Treason involves the breach of allegiance, and consequently a foreigner not in the country cannot be guilty of the offence. Aliens domiciled in the United States owe it allegiance, and may be prosecuted for giving aid and comfort to an enemy in the country in which he resides. See Homestead Treason, 1 P. A. District Report, 785.[6]

MISPRISION OF TREASON.

Every person owing allegiance to the United States, and having knowledge of any commission of treason against them, and who conceals and does not,

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[3] U. S. vs. Hoxie, 1 Paine (U. S.), 265.

[4] U. S. vs. Greathouse, 2 Abbott (U. S.), 364.

[5] U. S. vs. Greiner, 24 Law Rep., page 92; Resp. vs. McCarthy, 2 Dall., 86; 2 Horton C. L., Sec. 1801.

[6] Carlyle vs. U. S., 16 Wallace.

as soon as may be, disclose and make known the same to the President of the United States, or some judge, or to the governor, or to some judge or justice of any particular State, is guilty of misprision of treason.

The punishment of treason is death, or imprisonment, or fine, at the discretion of the court. The punishment of misprision of treason is imprisonment for not more than five years, and fine of not more than one thousand dollars.[7]

Under the federal constitution no person can be convicted of treason unless upon the testimony of two witnesses to the same overt act or upon confession in open court.[8]

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[7] U. S. Rev. St., Sec. 5332, 5336.
[8] U. S. Const., Art. 3, Sec. 3.

HOMICIDE.

CHAPTER IV.

HOMICIDE — JUSTIFIABLE AND EXCUSABLE — MURDER — MANSLAUGHTER.

Homicide is the killing of a human being, by conduct which causes death within a year and a day from the time of the act or omission to which the death is attributable.

KILLING.

Killing is here used in the broadest sense of that word. It includes every means or agency which is an efficient factor in causing, or hastening, death.

HUMAN BEING.

As the word itself indicates, there can be no homicide without the death of a human being.

By being is intended that there must be an independent life.[9] That is, a child unborn is not the subject of homicide.[10] To kill a child in its mother's womb, or even after it is partially delivered, is not murder at the common law. Every part of it must have come from the mother before it is regarded as an independent life.[11] But if a child be born alive and then die by reason of injuries received before

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[9] State vs. Winthrop, 43 Iowa, 519; 2 Am. Cr., 274.

[10] Evans vs. People, 49 N. Y., 86.

[11] Rex vs. Brain, 6 Car. & P., 349; Rex vs. Sellis, 7 Car. & P., 850.

birth, or, because the injuries, or a drug unlawfully administered, caused a premature birth, the wrongdoer is guilty of murder or manslaughter.[12]

AGENCY OR CAUSE OF DEATH.

We use the word conduct as including both acts and omissions, and series of acts, and series of omissions, and also the negligent manner in which a lawful act may be done by reason of which death results.

By a cause of death is meant any wrongful act, or omission, which brings about or hastens death. Or, to state the proposition more accurately, it means any wrongful act or omission without which death would not have occurred as soon as it did. For instance, if one is sick with incurable consumption from which death must result within a month, and one, knowing his condition, with felonious purpose, drenches the consumptive with cold water, by reason of which death supervenes immediately, he is as much guilty of murder as though he had stabbed him with a knife.[13] While in one sense consumption is the cause of death, yet it was not the immediate cause which produced death at the time when it occurred. In a just sense causing death and hastening death are the same thing, for all men must die some time.[14]

And so if one be mortally wounded, and a third person then kills him by an independent act, this latter is guilty of the homicide, and not the one who inflicted the first mortal wound.[15]

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[12] State vs. Winthrop, 43 Iowa, 519; Wallace vs. State, 10 Tex. App., 255.

[13] People vs. Ah Fat, 48 Cal., 61.

[14] Com. vs. Fox, 7 Gray, 585; State vs. Costello, 62 Iowa, 404; State vs. Scates, 5 Jones (N. C.), 420.

[15] State vs. Scates.

UNSKILLFUL MEDICAL TREATMENT.

In many cases an attempt has been made to escape the guilt of murder by the defense that death was not the result of the wound inflicted, but of subsequent unskillful surgical or medical treatment. But the law is loath to admit such a defense.[16] And the law under this head may be stated as follows: If the wound was in itself mortal it is regarded as the cause of death, no matter if the death was hastened by unskillful medical or surgical treatment, however gross the degree of unskillfulness.[17] And even if the wound was not mortal, that is, if without any treatment at all, the injured person would have recovered, yet, if in an effort to benefit him, he dies from the effect of unskillful treatment, still the person who inflicted the wound is responsible for the death, if the treatment was such as under the circumstances would have been deemed proper by surgeons who possessed the skill ordinarily possessed by surgeons in that neighborhood.

But on the other hand if the wound is not mortal, and death results from grossly unskillful treatment, the person inflicting the wound is not guilty of the death.[20]

At the common law homicide is not attributable to one, unless death occurs within a year and a day of the act to which it is attributed. This rule may be considered as a sort of statute of limitations in the

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[16] Key vs. State, 28 Ark., 155; 2 Am. Cr., 263.

[17] Com. vs. McPike, 3 Cush., 184; The People vs. Cook, 39 Mich., 236; Com. vs. Hackett, 2 Allen, 136.

[20] Coffman vs. Com., 10 Bush (Ky.), 495; Parsons vs. State, 21 Ala., 300; People vs. Cook, 39 Mich., 236; State vs. Bantley, 44 Conn., 537. But it must appear "clearly and certainly" that the death resulted from unskillful treatment and not from the wound. Crum vs. State, 64 Miss., 1; 7 Am. Cr., 372.

law of homicide. It precludes inquiry into how far the conduct of one may have contributed to, or hastened, the death of another unless the conduct was within a year and a day of the death.[21]

Homicide at the common law was of three kinds, justifiable homicide, excusable homicide, and felonious homicide. So far as punishment is concerned homicide may now be divided into two classes, viz.: unlawful or felonious homicide, and homicide which is not felonious. But at the common law a clear distinction was drawn between justifiable homicide and excusable homicide.

JUSTIFIABLE HOMICIDE.

Justifiable homicide means the taking of life by an act which the law commands or requires.

As the hanging of a condemned prisoner by the sheriff to whom the duty is committed at the place and time appointed by the judgment. It is to be observed that the authority and requirement of the law must be strictly followed in order to make a particular homicide a justifiable one. If the officer of the law were to execute the sentence of the law the day before the legal time, or were to shoot where he was commanded to hang, he would be legally guilty of murder.[22] And this is in harmony with a principle deeply embedded in our law which may be stated in this way. He who relies upon a statute, or judgment, or the common law, as justification for doing an act, which without the statute, or judgment, or the common law, would be a tort or a crime, cannot justify himself under the law unless he brings himself strictly within its terms.

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[21] State vs. Orrell, 1 Dev. (N. C.), 139.

DISTINCTION BETWEEN JUSTIFIABLE AND EXCUSABLE HOMICIDE.

The common law distinction between justifiable homicide, and excusable homicide, is this: In justifiable homicide a human being is put to death at the express requirement of the law. In excusable homicide, the killing must occur under circumstances by reason of which the law excuses the killing, either because it was the result of unavoidable accident, or because it became necessary in maintaining personal rights in a case where the law permits a defense to be made even to the taking of life. In justifiable homicide, the killing occurs in the performance of a public duty.

PENALTY OF EXCUSABLE HOMICIDE AT THE COMMON LAW.

The common law difference between justifiable homicide and excusable homicide as to penalty was this: In a case of justifiable homicide there was and could be no penalty for obeying the behest of the law. But excusable homicide involved a forfeiture of goods.[23] At the present time no legal punishment or forfeiture follows upon either. And this fact has led a great writer upon the criminal law to say that "the old distinctions in respect of homicides not felonious, are not now, in the United States, of any practical legal importance." [24]

But although excusable homicide is no longer punishable by law to any extent whatever, the student can hardly be expected to have clear ideals of the law of homicide unless he has clearly in his mind the es-

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[22] 4 Bl. Com., 178.

[23] 4 Bl. Com., 188. But even in Blackstone's time a remission of this penalty was granted as a matter of course.

[24] 2 Bish. Cr. Law, Sec. 613 et seq.

sential distinction between excusable and justifiable homicide.

JUSTIFIABLE HOMICIDE.

Justifiable homicide is divided by Blackstone into three kinds. The first where a prisoner is executed in accordance with the lawful judgment of a court of competent jurisdiction. The second is where a public officer necessarily kills, in the discharge of a public duty, one who resists him in the execution of his duty, whether in a civil or a criminal matter. And here the student will take notice that every public officer is clothed with all the power and authority of the state for the purpose of executing his duty as such. If he is resisted he may, in a case where his duty is clear, overcome the resistance, even if it becomes necessary to take life in doing so. A public officer, executing a public duty, is never required to retreat or to give way, but is bound to proceed in the execution of his duty at whatever cost.

Instances of justifiable homicide under this head occur where an officer is engaged in the service of a writ, either civil or criminal;[25] where he is trying to make a lawful arrest and is forcibly resisted;[26] where officers are lawfully engaged in suppressing a riot;[27] where a jailer is engaged in preventing the escape of prisoners in his charge[28] and the like.

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[25] Clements vs. State, 50 Ala., 117. See Head vs. Martin, 85 Ky., 480.

[26] State vs. Dieberger, 96 Mo., 666.

[27] Pond vs. People, 8 Mich., 150.

[28] This is to be understood of cases where the prisoners are endeavoring to prevent the jailer from doing his duty by the use of force and violence against his person. As will be seen hereafter, it is only in the case of atrocious crimes or at the least felonies, where an officer or jailer is justified in taking life simply to prevent an escape.

HOMICIDE IN PREVENTING ATROCIOUS CRIMES OR THE ESCAPE OF THOSE WHO ARE GUILTY OF AN ATROCIOUS CRIME.

The third class of justifiable homicide occurs in preventing atrocious crimes or the escape of persons who have committed them. Upon this, as upon many subjects, it is impossible to state the law with such exactness as will cover in advance every case which may arise. And, in connection with what we shall have to say upon this subject in detail, it is proper to call the attention of the student to the fact, that it is impossible to formulate law in such a way that it can be applied to human actions and conduct as a measure can be applied to a straight line. The actual facts in cases which come before the courts for adjudication are infinite in variety. The law is, and should be, a system of principles by which every man may be protected in the exercise of his legal rights, which will do justice between man and man in their dealings with each other, and in the criminal law which will prevent future crime by punishing one who has been guilty of crime. Criminal punishment has two aspects. It is vindictive, and preventive. It is preventive in that for a given time or forever the criminal has no opportunity to repeat his crime.

It is vindictive in that it awards a certain punishment for a certain offense, and the effect of this is deterrent. It tends to deter others who would be inclined to commit the same crime were it not for fear of incurring the penalty of the law. To attempt to reduce the law to the limits of an exact science would be simply to give those who wish to violate its principles, without incurring its penalties, additional facilities in attempting to evade it and its eternal purposes.

Therefore it is impossible to urge too strongly upon the student the proposition, that it is the glory of our system of law that it is a law of principles, rather than a set of unbending rules, which, applied to human actions in a given case, would be quite as likely to work injustice as justice.

Let us return, after our digression, to the subject of the right to kill when necessary to prevent atrocious crimes, or to prevent the escape of those who have been guilty of them.

Generally speaking, a wilful homicide is justified by the law, when it becomes necessary to kill in order to prevent the commission of an atrocious crime, or to prevent the escape of one who has committed an atrocious crime.

While the law has a tender regard for human life, even to that extent that it is as much murder to take the life of a felon condemned to die without warrant of law, as it is to take the life of his jailer, it does not protect the life of one who is at the time attempting by force to commit a grievous crime,[29] or even who is attempting to escape after committing an atrocious crime, if there is no way of preventing the crime, or the escape, but by taking life. By examining the subject in detail we shall see under what circumstances the taking of human life is excused by the law.

Blackstone's statement of the law upon this point is as accurate and clear as any that could be formulated to-day. He says: "In the next place, such homicide, as is committed for the prevention of any forcible and atrocious crime, is justifiable by the law of nature and also by the law of England, as it stood so early as the time of Bracton, and as it is since de-

[29] Robbery, Crawford vs. State, 90 Ga., 701; 9 Am. Cr., 587.

clared in statute 24 Hen. VIII., c. 5. If any person attempts a robbery or murder of another, or attempts to break open a house, in the night-time (which extends also to an attempt to burn it), and shall be killed in such an attempt, the slayer shall be acquitted and discharged.[30] This reaches not to any crime unaccompanied with force, as picking of pockets;[31] or to the breaking open of any house in the day-time, unless it carries with it an attempt to robbery also. Our law likewise justifies a woman killing one who attempts to ravish her; and so too the husband or father may justify killing a man who attempts a rape upon his wife or daughter; but not if he takes them in adultery by consent, for the one is forcible and felonious, but not the other.[33] And I make no doubt but the forcibly attempting a crime of a still more detestable nature, may be equally resisted by the death of the unnatural aggressor. For the one uniform principle that runs through our own, and all other laws, seems to be this: that where a crime, in itself capital, is endeavored to be committed by force, it is lawful to repel that force by the death of the party attempting. But we must not carry this doctrine to the same visionary length that Mr. Locke does, who holds, "that all manner of force without right upon a man's person, puts him in a state of war, and that of consequence being in such a state of war, he may lawfully kill him that puts him under this unnatural restraint." However just this con-

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[30] State vs. Moore, 31 Conn., 479; State vs. Thompson, 9 Iowa, 188; Crawford vs. State, 90 Geo., 701; Pond vs. People, 8 Mich., 150.

[31] State vs. Vance, 17 Iowa, 138; Stoney vs. State, 71 Ala., 329; The People vs. Cook, 39 Mich., 236.

[32] People vs. Angeles, 61 Cal., 188; 4 Bl. Com., 181.

[33] Bone vs. State, 86 Ga., 108; State vs. Herrell, 97 Mo., 105.

clusion may be in a state of uncivilized nature, yet our law, like that of every other well-regulated community, is too tender of the public peace, too careful of the lives of the subjects, to adopt so contentious a system; nor will it suffer with impunity any crime to be prevented by death, unless the same, if committed, would also be punished by death.[34]

At the common law every felony was punishable by death. Hence many text writers have laid it down that it is lawful to take life to prevent the commission of a felony, if it cannot otherwise be prevented. But this statement of the law is too broad. There are many felonies which have nothing dangerous, or atrocious, in their character, and, as to such, our American law does not sanction the taking of life to prevent their commission. There must be something of an atrocious or dangerous character to a felony, which will justify the taking of life, to prevent its commission, or the escape of the offender.

It will also be noted that Blackstone says that the common law rule was based upon the rule that no crime might be "prevented by death, unless the same, if committed, would also be punished by death." This test can no longer be applied, because there are now very few felonies punishable by death, and, in some States, the death penalty is abolished in all cases of felony. Hence, the principle is now to be laid down that in case of felonies, not attempted to be committed by force, that is, in spite of a forcible resistance, killing is only to be resorted to to prevent felonies of an atrocious character, or such as involve danger to life, or the security of a man's dwelling.

It is broadly laid down by eminent writers on the common law that an officer, seeking to arrest a felon

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[34] 4 Bl. Com., 171.

who refuses to stop when required to, but continues his flight, has a right to kill to prevent the felon's escape, if he cannot otherwise take him. There are also many cases in which judges have declared that this is the law.[35] But this right does not exist in cases of misdemeanor.[36] It is a doctrine which comes down to us from early times, and smacks of the severity of the ancient common law. The American cases show a tendency to mitigate the harshness of the rule, and to limit it to cases where the felony is of an atrocious character, and the guilt of the person fleeing is clear. In a modern North Carolina case it was held that the doctrine did not apply to all felonies, but only to cases of rape, murder and other like capital felonies, where the district or vicinity was, at the common law, subject to amercement, if the felon were allowed to escape. Consequently, it was held in that case that one was not justified in shooting to prevent the escape of one who had stolen a hog.[37]

In one case it was said that so long as the person sought to be arrested (charged with murder) was content peaceably to avoid arrest, the pursuing party had no right to kill him.[38] In Texas it was held that an officer had no right, in cases of misdemeanor, to shoot at one who refused to halt when called upon to do so,[39] and in another, that a penitentiary guard had no right to shoot an escaped convict who continued to flee when called upon to stop, and that he was rightly convicted of murder in the second degree for

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[35] Brooks vs. Com., 61 Pa. St., 352.
[36] Jackson vs. State, 66 Miss., 89.
[37] State vs. Bryant, 65 N. C., 327.
[38] State vs. Anderson, 1 Hill (S. C.), 327.
[39] Tiner vs. State, 44 Tex., 128; Head vs. Martin, 85 Ky., 480.

so doing.[40] In an old case in North Carolina, where a householder was waked up in the night by a stranger going from the house to the gate, and called upon him to halt, and the stranger not stopping, fired upon him and killed him, it was held that he was rightly convicted of manslaughter.[41] And it was held that the following request to charge was rightly refused: "If the defendant had reason to believe that a felony had been committed on his property they ought to find him excused, and not guilty of any crime, if the killing took place in endeavoring to arrest the deceased for the supposed felony."[42] In a New York case the law is thus stated: "The distinction is marked between cases of misdemeanor and felony. It is only in the latter that a homicide is justifiable by any person acting without a warrant, even when it is the only means to prevent the escape of the criminal. When no warrant is out for the offender, even an officer cannot take his life to prevent his escape upon his own belief of the commission of a felony, however reasonable ground he may have for such a belief. If he acts without warrant, he must be prepared to show the fact of the felony in order to justify taking the life of a person whom he is endeavoring to arrest or secure.[43]

In any case, a felon must not be killed in endeavoring to effect his arrest, if the officer can capture him without such severity, by obtaining assistance or otherwise, of which the jury ought to inquire.[44] An officer, in shooting at a fugitive whom he is seeking

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[40] Wright vs. State, 44 Tex., 645. See State vs. Tarlington, 102 Mo., 642.
[41] State vs. Roane, 2 Dev. (N. C.), 58.
[42] Ibid.
[43] Conraddy vs. People, 5 Park. Cr., 234.
[44] Williams vs. State, 44 Ala., 41.

to arrest, always exposes himself to a criminal prosecution; and he cannot be assured of vindication unless he is able to prove that the fugitive is certainly guilty of a serious crime.

EXCUSABLE HOMICIDE.

DEFENSE OF THE PERSON.

The law admits the right of self-defense, but this right is not an unqualified one where human life is involved. The right to take life in defense of one's person is limited to cases where it becomes necessary to repel an attack which threatens death, or serious bodily harm. It is not permitted to take life to repel every assault upon the person; the injury threatened must be serious. And as to how serious the injury must be which is threatened there is no absolute criterion. Any injury which would amount to mayhem is a serious injury.[45] So also any injury which would impair constitutional vitality. On the other hand, a common assault and battery is not so serious an injury as justifies the taking of life to prevent it, or stop it when begun.[46]

DUTY TO RETREAT WHEN PRACTICABLE.

In the next place, the law does not justify taking life to repel an assault, however grievous the injury that it threatens, if the danger can be otherwise avoided. Life is only to be taken in the last extremity. Any defense less than the taking of life, which is sufficient, must first be resorted to. And if one can retreat with safety it is his duty to do so, rather

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[45] Young vs. State, 11 Humph. (Tenn.), 200; State vs. Sloan, 47 Mo., 604; Brownell vs. People, 39 Mich., 732.

[46] Stewart vs. State, 1 Ohio St., 66; Scales vs. State, 11 S. W. Rep., Ala., 121; People vs. Doe, 1 Mich., 451.

than to await the attack where he is.[47] But this duty to retreat is not absolute; that is, it is only when retreat opens a door to safety that one is obliged to resort to it. In many cases it is more dangerous to retreat than to stand and confront the aggressor, and in such a case it is not necessary to retreat.[48]

In his own dwelling a man need not retreat.

Again, if one is in his own dwelling when he is attacked, he is not obliged to retreat, though he might do so with safety. It was one of the boasts of our ancestors that "an Englishman's house is his castle." He has a right to defend his home against all unauthorized intruders. It is his refuge, and, being there, he need go no further to seek safety. As was said by a judge who was a profound criminal lawyer: "A man is not obliged to retreat, if assaulted in his dwelling, but may use such means as are absolutely necessary to repel the assailant from his house, or to prevent his forcible entry, even to the taking of life." [49] And there is a growing tendency in favor of the doctrine, that if a man is where he has a right to be, he is never obliged to retreat when feloniously assaulted.[50]

What a man may lawfully do in the defense of his

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[47] State vs. Donnelly, 69 Iowa, 705.

[48] People vs. Lilly, 38 Mich., 270; Runyan vs. State, 57 Ind., 80; 2 Am. Cr., 318; Duncan vs. State, 49 Ark., 543.

[49] Estep vs. Com., 86 Ky., 39; Campbell J. in Pond vs. People, 8 Mich., 150. In a late case the Supreme Court of the United States said: "We cannot agree that the accused was under any greater obligation when on his own premises, near his dwelling house, to retreat or run away from his assailant, than he would have been if attacked in his own dwelling house." Babe Beard vs. U. S., 158 U. S., 550; 91 Am. Cr., 324.

[50] Erwin vs. State, 29 Ohio St., 186; 2 Am. Cr., 251; Runyan vs. State, 57 Ind., 80; 2 Am. Cr., 318.

own person, he may lawfully do in defense of those who have a right to look to him for protection, or assistance, in case of an assault. This includes all members of his family, his servants, and those in his company.[51] And so an officer may justify in defense of any citizen what he could justify in his own defense. And, although the rule is not usually so broadly stated, it is difficult to see upon what principle any citizen is not justified in assisting to defend any person threatened with an atrocious or grievous assault. It is not only the right, but the duty of a private citizen to arrest one whom he finds in the act of committing an atrocious crime, and we can see no reason why he is not equally in the line of his duty in defending any one who is unlawfully attacked.[52]

APPARENT DANGER.

One who claims to excuse a homicide upon the ground of self-defense is to be judged by the circumstances of the case as they reasonably appeared to him at the time of the fatal act.[53]

This is a very important rule in the law of homicide, and one which is frequently invoked. It is in accordance with a principle which pervades the whole criminal law that a man may often be excused from the guilt of crime by reason of his excusable ignorance of matters of fact. A full discussion of this general principle is found in the section on criminal intent. We here quote the language used by an eminent judge in a case involving the law of self-

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[51] State vs. Westfall, 49 Iowa, 328; 3 Am. Cr., 343; Hatheway vs. State, 32 Fla., 56.

[52] See People vs. Curtis, 52 Mich., 617; see in re Neagle, 135 U. S., 1.

[53] Patten vs. People, 18 Mich., 314; State vs. Collins, 32 Iowa, 36.

defense: "Were a man charged with crime to be held to a knowledge of all facts precisely as they are, there could be few cases in which the most innocent intention or honest zeal could justify or excuse homicide. The jury, by a careful sifting of witnesses on both sides, in cool blood, and aided by the comments of court and counsel, may arrive at a tolerably just conclusion on the circumstances of an assault. But the prisoner, who is to justify himself, can hardly be expected to be entirely cool in a deadly affray, or in all cases to have great courage or large intellect; and can not well see the true meaning of all that occurs at the time; while he can know nothing whatever concerning what has occurred elsewhere, or concerning the designs of his assailants, any more than can be inferred from appearances. And the law, while it will not generally excuse mistakes of law (because every man is bound to know that), does not hold men responsible for a knowledge of facts unless their ignorance arises from fault or negligence." [54]

DEFENSE OF LIBERTY.

The right to defend one's liberty rests upon the same general principles as the right to defend the person. If no serious mischief is to be apprehended beyond a temporary deprivation of liberty in the custody of known public officers, the law does not permit the taking of life in resisting an illegal arrest.[55] On the other hand, an arrest may be attempted by private citizens, or officers acting outside their jurisdiction, under such circumstances as will justify resistance even to the taking of life.[56]

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[54] By Campbell, J., in Pond vs. People, 8 Mich., 150; and see Panton vs. People, 114 Ill., 505; 5 Am. Cr., 425.
[55] State vs. Cantieny, 34 Minn., 1; 6 Am. Cr., 418.
[56] People vs. Burt, 51 Mich., 199.

No precise line can be drawn. As we have said, it is, as in defense of the person, a question of the degree of mischief which, under the circumstances of the case, may reasonably be apprehended. But an arrest, even by known officers, not for the purpose of bringing the prisoner before the courts of the State where he is arrested, but for the purpose of kidnapping him into another State, or country, may lawfully be resisted to the death.

DEFENSE OF PROPERTY.

Men have a general right to use a reasonable and necessary degree of force to protect their peaceable possession of real or personal property. But this right does not extend to the taking of life except where the effort is to deprive a man of his property by a forcible felony such as robbery or burglary.[57] And the right to defend the possession of real property by taking life is limited to the dwelling house.

ACCIDENTAL EXCUSABLE HOMICIDE.

Homicide sometimes occurs as the result of an accident. Blackstone says: "Homicide per infortunium or misadventure is where a man doing a lawful act, without any intention of hurt, unfortunately kills another; as where a man is at work with a hatchet, and the head thereof flies off, and kills a stander-by; or where a person, qualified to keep a gun, is shooting at a mark, and undesignedly kills a man; for the act is lawful and the effect is merely accidental." In these, and cases depending upon like principles, the homicide is excusable. It will be observed that Blackstone's statement limits excusable

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[57] Crawford vs. State, 90 Ga., 701; People vs. Horton, 4 Mich., 67.

homicide to cases where the act which resulted in death was a lawful act.

But the law does not always attribute the guilt of homicide to an act which causes death even though it be an unlawful act. There may be a blow given in sport [58] which, by reason of unforeseen circumstances, may result in death, and yet the wrongdoer will not be held guilty of felonious homicide.[59] And the test is this: If the act, although unlawful, was one which was not likely to cause death, or anything beyond a trifling bodily injury, death, if it occurs, will be attributed to accident rather than to the unlawful act. And this is in accord with the general doctrine of the law, that while a man is held criminally responsible for the ordinary and natural consequences of his act whether or not he foresaw and intended these consequences, yet he will not be held criminally responsible for unforeseen and extraordinary consequences. For such consequences he may be held responsible civilly, but not criminally. Every crime consists in act and intent. And the law is not so unjust as to impute to a man an intent that a certain consequence should follow, which nobody could possibly foresee or apprehend would follow.

FELONIOUS HOMICIDE.

We come now to an examination of the law as to felonious homicide, for which the preceding discussion on justifiable and excusable homicide has cleared the way. Felonious homicide includes acts of all shades of guilt, from the blackest and most detestable of crimes, to those which are separated from innocent or just acts by an almost imperceptible line. The

[58] Reg. vs. Conrahy, 2 Crawf. & Dix C. C., 86.
[59] People vs. Rockwell, 39 Mich., 503.

common law divides felonious homicide into murder and manslaughter.

MURDER.

Murder consists in the unlawful killing of a human being with malice aforethought.

The observant student will have observed that whereas we are now treating of felonious homicide, we use in the definition the term unlawful instead of felonious. These words, felonious, and unlawful, are used in criminal pleading. Every common law pleading which charged a felony averred that the act was feloniously done. Every common law pleading which charged a misdemeanor alleged that the act was unlawfully done. Every act which amounts to a felony, if done unlawfully, is felonious. Every act which amounts to a misdemeanor only is unlawful but not felonious. Every unlawful homicide is a felony. Therefore, in defining murder or manslaughter, we may describe it either as an unlawful or a felonious homicide.

The distinguishing characteristic of murder is that it is done "with malice aforethought," or, as the old writers used to say, "malice prepense."

When we have learned what meaning the law attaches to these words we shall be able to pronounce whether or not a given homicide is murder.

AFORETHOUGHT.

Before proceeding to a discussion of the meaning of the word malice in the definition of murder, we may stop upon the word aforethought, with which it is coupled. This does not mean that there must have been a studied design or plan to kill for any particu-

lar length of time before the killing. It means merely a fixed conscious purpose to commit the crime by one whose mind is unclouded by passion arising from a reasonable provocation. The purpose to kill may have been entertained but a moment.[60]

MALICE.

The word malice has in law a much broader signification than it has in common speech. In ordinary language the word malice involves the idea of hatred to an individual, coupled with a purpose to do that individual an injury. This is also one of the meanings included within legal malice. But legal malice includes many other states of mind than this. It includes any evil, wicked or malignant state of mind, or purpose, under the influence of which an act dangerous to life is done. As Blackstone says, "The dictate of a wicked, depraved and malignant heart; a disposition to do an evil thing." It is upon this principle that homicide committed while in the act of perpetrating any felony, as rape, robbery, burglary, arson, is murder, although in the particular case there is no feeling of hostility toward any individual, nor any design to take life or to inflict any bodily harm upon any person.[61]

Malice is commonly divided by the law writers into two kinds; express malice, and implied malice. By express malice is intended that particular and personal malice against an individual which intends to

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[60] People vs. Williams, 43 Cal., 344; Con. vs. Webster, 5 Cush. (Mass.), 285; Nye vs. People, 35 Mich., 16. In some courts deliberation is essential to the crime of murder in the first degree. Jones vs. Con., 25 Smith Pa., 403; Atkinson vs. State, 20 Tex., 522.

[61] See ante title Intent; State vs. Pike, 49 N. H., 399; Weller vs. People, 30 Mich., 16.

take life, or to inflict great bodily harm; by implied malice is meant that evil and malignant purpose, or state of mind, which prompts the act resulting in death in a case where there is no evidence of express malice toward the deceased. The difference is defined in an Illinois statute as follows: "Express malice is that deliberate intention unlawfully to take away the life of a fellow creature which is manifested by external circumstances capable of proof. Malice shall be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned or malignant heart." In truth, the distinction between express and implied malice is of little value, and is more likely to confuse the mind than to lead to a clearer understanding of the crime of murder. And for this reason: From what is said about implied malice, the conclusion is sometimes arrived at, that, by the use of the phrase implied malice, the law imputes to an act an intent different from that with which it was actually done. This is always an erroneous notion. The intent is an essential ingredient in every crime, and the question of what intent actually did combine with the act in a particular case, is always a question of fact and can never be imputed as matter of law. There are what are called legal presumptions, but even the use of this phrase is to a certain extent misleading.

PRESUMPTIONS.

In the criminal law there is no such thing as a legal presumption of fact.

That is, there is no rule, by virtue of which one fact is proved by another as a matter of law. What is called a legal presumption is merely a rule that a certain fact, or certain facts, are evidence from

which the triers of the question of fact may find another fact. But this other fact must, in the criminal law, always be found (i. e., believed) as a fact. This principle was the burden of Erskine's great argument on the rights of juries in the Dean of St. Asaph's case, and his argument is unanswered, and unanswerable. To illustrate the matter under discussion: In the law of larcency it has frequently been said that from the recent unexplained possession of stolen property the law presumes that the person in whose possession the property is found committed the larcency. This is not correct. The true legal rule is that the recent unexplained possession of stolen property is evidence from which the jury may find (i. e., believe) that the person in whose possession the property is found is the thief.[62] But it must be found by the jury as a fact; it is not an inference or presumption of law.

In the law of murder it is often said that the mere fact of the killing, unexplained, raises a presumption of that malice aforethought which is a necessary ingredient of the crime of murder. But this is not correct. The bare fact of the homicide, with no proof of attendant circumstances, is evidence to be submitted to a jury, that the killing was done with malice aforethought, either express or implied, as these are explained. And we apprehend that he would be a hardy judge who should undertake to direct a jury to bring in a verdict of murder in a case where there was no evidence except that the accused killed the deceased. Discarding therefore the language frequently used as to presumptions, the rule is thus stated.

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[62] See note on this subject, 1 Am. Cr. Rep., 574.

DEGREES OF MURDER.

An unlawful, and unexplained, homicide is evidence of murder, but where murder is divided into two degrees, it is evidence of murder in the second degree.[63]

At the common law there were no grades or degrees of murder. But by statute now in most, if not all, of the states, murder is divided into murder in the first degree, and murder in the second degree. The Michigan statutes on this subject sufficiently illustrate the definition of the two degrees generally prevalent in this country. They are as follows (2 How. St., 9075, 9076):

"All murder which shall be perpetrated by means of poison, or lying in wait, or any other kind of wilful, deliberate and premeditated killing, or which shall be committed in the perpetration of, or attempt to perpetrate, any arson, rape, robbery or burglary, shall be deemed murder of the first degree, and shall be punished by solitary confinement at hard labor in the State prison for life.

All other kinds of murder shall be deemed murder of the second degree, and shall be punished by imprisonment in the State prison for life, or any term of years, in the discretion of the court trying the same."

This statute is sufficient to indicate in a general way the distinctions which usually prevail in the United States between murder in the first degree and murder in the second degree. To constitute murder

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[63] State vs. Underwood, 57 Mo., 40; Jones vs. Con., 75 Pa. St., 262; McCue vs. Com., 78 Pa. St., 185; prima facie murder is murder in the second degree; McDaniel vs. Com., 77 Va., 281; 4 Am. Cr., 369.

in the first degree there must be express malice,[64] as this has been explained, or it must have been committed in the perpetration of one of the four felonies named, which, being regarded as peculiarly atrocious in their nature, are placed in a class by themselves.

The words, "or any other kind of wilful, deliberate, and premediated killing," deserve some attention, inasmuch as they serve to illustrate a general rule of statutory construction which is often applied in construing criminal statutes. These are what are called general words, following certain enumerated particulars. The general principle to which attention is now drawn is thus stated.

General words in a statute which follow enumerated or particular classes, are restrained by construction to mean other classes of the like general character of those enumerated.[65]

Very many criminal statutes have been subjected to the operation of this rule. A statute which provided that "every person who shall set fire to any building, or to any other material, with intent to cause any such building to be burned, or shall by any other means attempt to cause any building to be burned" was held not to include a case where the accused solicited another to set fire to a building, and furnished him matches and kerosene oil for that purpose, because the attempt by soliciting another was not of the same class as those enumerated, the enumerated classes covering only cases where something

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[64] To constitute murder in the first degree there must be an express purpose to take life. Swan vs. State, 4 Humph., 136; State vs. Smith, 32 Me., 369; Hagan vs. State, 10 Ohio St., 459.

[65] Sedgewick Stat. Constr., 360; State vs. Goetze, 22 Wis., 363; St. Louis vs. Laughlin, 49 Mo., 559.

was actually set on fire.[66] Another statute providing "that no tradesman, artificer, workman, laborer, or other person" should exercise his ordinary calling on Sunday was held not to include a farmer, who is not of the same general class with those persons, specifically mentioned.[67]

DEADLY WEAPON.

The use of a deadly weapon is evidence of malice aforethought.[68]

Having once explained the rule that the intent with which an act is done is a question of fact, to be found as a fact, we adhere to our rule of discarding the phrase presumption. Many law writers and many cases say that the law presumes malice from the use of a deadly weapon, but this phrase is as confusing and misleading as the phrases by which we illustrated the proposition that the furthest the law can go in a criminal case is to say that a proven fact is evidence, to be weighed by the triers of fact, as to whether or not another allegation is true.

What is a deadly weapon is a question of fact and not a question of law.[69] And whether or not a weapon used against another is, or is not, a deadly weapon in a particular case may depend upon the

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[66] McDade vs. People, 29 Mich., 50; S. C. 1 Am. Cr., 81.

[67] Reg. vs. Whitmash, 7 B. & C., 596.

[68] Green vs. State, 28 Miss., 687; Jones vs. State, 29 Geo., 594. Generally speaking, where no deadly weapon is used, nor any force set in motion likely to cause serious bodily harm, if death unexpectedly results from an unlawful assault, the offense is manslaughter and not murder. So held of blows with the naked fist. People vs. Mack, 65 Cal., 211; 6 Am. Cr., 431.

[69] People vs. Leyba, 74 Cal., 407; Dothing vs. State, 1 Am. Cr., 60; but see State vs. Collins, 8 Ired., 407.

manner in which it is used in the case in question. From these two propositions we deduce the rule as to what shall be regarded as a deadly weapon.

A deadly weapon is one which is dangerous to life when used in the manner in which it is capable of the most injurious results.[70].

Some weapons are essentially deadly weapons, as, for instance, a loaded revolver.[71] Others may or may not be, according to the manner in which they were used in the case in which the question arises. In one case it was left to the jury to say whether or not a stake thrown at another was a deadly weapon, considering the manner in which it was used.[72]

SUICIDE.

Suicide is self murder, and anciently the body of the suicide was buried in the highway with a stake through it, and the goods and chattels of the suicide were forfeited to the crown. This was because of its supposed deterrent effect. No such consequence follows now, but one who is present and counsels and abets a suicide is guilty of murder.[73] And one who kills another at his own request is guilty of murder.[74]

MANSLAUGHTER.

Manslaughter is the unlawful killing of another without malice aforethought.

The absence of malice aforethought is the distinguishing characteristic of manslaughter. But this,

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[70] U. S. vs. Small, 2 Curt. C. C., 241.
[71] State vs. Collins, 8 Ired., 407.
[72] Rex vs. Wiggs, 1 Leach, 378.
[73] Com. vs. Bowen, 13 Mass., 356; Rex vs. Hughes, 5 Car. & P., 126.
[74] Blackburn vs. State, 23 Ohio St., 146.

after all, is little more than a highly technical legal rule and is not to be understood without certain limitations and qualifications, as will be seen when we inquire more minutely into the distinction between murder and manslaughter.

PROVOCATION.

When one unlawfully slays another in the heat of passion, caused by adequate provocation, the crime is no more than manslaughter.

In voluntary manslaughter there is often a direct intent to kill.[75] This is the very intent which constitutes that express malice which is an ingredient of the crime of murder. Yet where there is adequate provocation the offense may be manslaughter and not murder.[76] If a homicide is committed under the influence of passion, or in heat of blood produced by an adequate or reasonable provocation, and before a reasonable time has elapsed for the blood to cool and reason to resume its sway, and is the result of the temporary excitement by which the control of reason was overthrown, rather than any wickedness of heart, or cruelty, or recklessness of disposition, the offense is manslaughter and not murder. By adequate or reasonable provocation is meant a provocation, under the influence of which, an ordinary man of fair average disposition is likely to act rashly, without due deliberation or reflection, and from passion rather than judgment.[77] What is a reasonable or adequate provocation is a question of fact, and not a question of law. But it is frequently stated as matter of law that mere words are never an adequate

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[75] People vs. Lilley, 43 Mich., 521.
[76] Maher vs. People, 10 Mich., 212.
[77] Maher vs. People, 10 Mich., 212.

provocation.[78] On the other hand a beating is generally, if not universally, regarded as an adequate provocation.[79] And this is one of the many evidences that the common law is a system which grew up among a rude and hardy people, that is, a race which was not sensitive. The rule is paralleled by an ancient proverb of our ancestors that hard words break no bones. The rule now under discussion never would have become law and never was law among the Latin races whose sensitive and fiery passions are more easily aroused by insulting words than by blows.[80]

COOLING TIME.

Another important rule of law as to provocation is the rule as to cooling time. Our law allows for the effect of adequate provocation if the act which it causes is immediate. But it makes no allowance for a grievance which is permitted to rankle and fester in the mind. It says in effect what was prescribed by a much more ancient code, "let not the sun go down upon thy wrath." To one who nurses a grievance until it becomes an impelling motive for revenge it attributes an evil and malignant heart which is legal

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[78] Com. vs. York, 9 Metc., 93; Smith vs. State, 103 Ala., 4; 9 Am. Cr., 320.

[79] Reg. vs. Stedman Fost. Crown Law, 292; Hurd vs. People, 25 Mich., 405. And so where a father's passion was aroused by seeing another beat his child. McWhirt's case, 3 Gratt (Va.), 594.

[80] There are some modern cases which are in conflict with the old rule that mere words are never an adequate provocation. Reg. vs. Rothwell, 12 Cox Cr. Cas., 145. For a man to find his wife in the act of adultery is an adequate provocation which will reduce the killing of her, or her paramour, to manslaughter. Mays vs. State, 88 Geo., 399; but not so of a brother who detects his sister in an act of adultery. Lynch vs. Com., 77 Pa. St., 205; State vs. Hackett, 70 Iowa, 442.

malice. Therefore in our law it is settled that provocation, however great, will not make an unlawful homicide, manslaughter instead of murder, if a sufficient time has elapsed between the provocation and the homicide, for the passion of an ordinary man of fair average character to subside.[81]

There is one more important limitation upon the general doctrine as to the influence of an adequate provocation in cases of homicide, which is this: Although there was an adequate provocation, yet if the homicide was the result of a brutal and malignant disposition of mind, or of particular malice toward the individual, instead of heat of blood, the killing is murder and not manslaughter.[82] This principle was strikingly illustrated in a celebrated case which arose in Chicago. A police officer was shot and killed by a notorious criminal while the officer was attempting to arrest him illegally. It is the general rule of the law that an attempt to make an illegal arrest is so great a provocation that if the officer attempting it is killed, the offense is manslaughter and not murder.[83] But in that case it was held that, if the killing was prompted rather by malice towards the individual than by passion and indignation aroused by the attempted unlawful arrest, the killing was murder. Upon the final trial of this case upon these principles

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[81] State vs. Moore, 69 N. C., 267; People vs. Bush, 65 Cal., 129; 5 Am. Cr., 459; the People vs. Tilley, 43 Mich., 521. On this principle it was held that going into a field and killing a man there at work, because he had been guilty of adultery with the wife of the slayer was murder "absolute and unqualified." Jackson vs. State, 91 Ga., 271.

[82] People vs. Lilley, 43 Mich., 521; Reg. vs. Walsh, 11 Cox Cr. Cas., 336.

[83] Rex vs. Thompson, 1 Moody Cr. Cas., 80; Rafferty vs. People, 69 Ill., 287; Creighton vs. Com., 84 Ky., 103. See ex parte Sherwood, 29 Tex. App., 334; Graham vs. State, 28 Tex. App., 582.

the jury found the prisoner guilty of murder and he was executed for his crime.[84]

FELONIOUS HOMICIDE OCCASIONED BY GROSS NEGLIGENCE OR NEGLECT OF PLAIN LEGAL DUTY.

The student will remember that in defining homicide in speaking of a cause of death we used the word "conduct" as including both acts and omissions. Up to this point we have been dealing chiefly with acts of violence directed against the person as causes of death. We are now to consider especially that class of homicides which result from conduct, which is wilfully careless and negligent in matters in which the life or safety of another is involved. Every man owes a duty to the life and safety of every other man. It is a principle analogous to that which finds expression in an ancient maxim of the common law, "sic utere tuo ut alienum non laedas." Every man is to a certain extent his "brother's keeper" and is legally bound to a certain degree of care for his brother's life, his safety, and even his morals. There are many acts which are punishable by law simply because by their evil example they tend to corrupt morals, and which are only legally criminal where they are sufficiently public to have this effect. For instance, our law does not punish illicit commerce between two unmarried persons of opposite sex. But if it is carried on in such a way that it amounts to "open and notorious lewdness," it is almost universally punishable by law. It is because this latter tends "to corrupt the morals of youth." And so deeply seated is this feeling in humanity that among the ancient Greeks anything which tended to corrupt the morals of youth was punishable by death; and it was on a

[84] Rafferty vs. People, 72 Ill., 37.

charge of this kind that Socrates, one of the greatest of philosphers of all time, was condemned to die. But returning from our digression to the law of homicide, we are now to see in what cases and in what degree one is held responsible for negligence which results in the death of a human being. It is difficult and probably impossible to formulate a rule or rules to cover all the cases which have arisen or are likely to arise. But this much may be said:

Every one in whom is attributable an act of gross negligence or serious omission of duty, dangerous to life, and which results in the death of another, is criminally responsible for the death, and is guilty of murder or manslaughter, according to the degree of recklessness of human life manifested by the act or omission.[85]

A reference to a few of the adjudicated cases will serve to illustrate what is intended to be conveyed by this rule.

Furious driving along a public highway is an act which menaces the safety of others who may be in the highway and if it is the cause of death the act will be manslaughter,[86] or murder,[87] according to the degree of negligence manifested.

Physicians and surgeons, or those undertaking the work of physicians and surgeons, may be guilty of manslaughter, or murder, by reason of their negligence, and this negligence may be found, either in lack of competent skill and knowledge, or in the fail-

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[85] Territory vs. Manton, 18 Mont., 95; 8 Am. Cr., 521; Lewis vs. State, 72 Ga., 164; 5 Am. Cr., 381; State vs. Hardie, 47 Iowa, 647; 2 Am. Cr., 326.

[86] Rex vs. Timmins, 7 C. & P., 499.

[87] Kennedy vs. Way, Brightly, R., 186.

ure to exercise it.[88] For instance, one who is admitted to treat a patient because he professes knowledge and experience which he knows he does not possess, and treats him in such a manner that death results, may be guilty of either manslaughter or murder, depending partly on the degree of recklessness, and partly on the real motive of the person accused. For in the case we are now considering if one were to profess competent skill to perform a dangerous surgical operation, knowing that he had no such skill, and that the result was a mere matter of chance, and his only motive was to gain a large fee without regard to results, and death resulted, this would show such a degree of recklessness of life as would involve the guilt of murder. On the other hand, a totally unskilled person might do the same act and be held blameless by the law. If the emergency arose in a wilderness where competent knowledge and skill was not available, and immediate action was, or appeared to be, necessary, and the treatment was undertaken without false pretensions, and from no unworthy motive, no legal blame would attach.

And this statement is simply another illustration of principles which pervade the criminal law, all of which tend in the same direction. When a man is accused of crime and is brought up for trial, the first question involved is whether the act complained of was right or wrong. And the question as to whether the act was right or wrong must be determined, not by unassisted human reason, but by the standard fixed by the law. Yet our law, when dealing with persons accused of crime, never forgets that intent is always an important factor. And it tries the act according to the legal standard, which involves act and

[88] Com. vs. Pierce, 138 Mass., 165; 5 Am. Cr.., 391.

intent. The degree of criminality in a particular case ordinarily depends especially upon the intent, as this has been explained, more than it does upon the act itself. And intent, as we have seen, is in the criminal law a word of very broad signification and involves all of the factors, which would be considered by ordinary persons in determining a question of morals, or, as we have expressed it before, a question of right or wrong, and if wrong, to what extent. It is by these principles that a wrongful act resulting in homicide is tested, and in the light of which it is determined, whether the act is murder or manslaughter.

Here it is proper to call the attention of the student to a rule upon the subject of professional knowledge and skill which is universally acted upon by the courts in both civil and criminal cases. No man is legally held in any case to possess the highest degree of knowledge and skill in his profession, or in other words, in the calling in which he offers his services to the public as a person skilled in that calling. He is bound to possess a reasonable degree of such skill or knowledge.[89] And by a reasonable degree is intended such a degree of knowledge and skill as is ordinarily possessed by those who follow the same calling in his neighborhood. Possessing that degree of knowledge and skill he is bound to exercise it in a case in which his services are employed. If, then, one called to act as a physician or surgeon, is negligent according to the standard by whch he must be judged as above stated, and by reason of his negligence death results, he may be guilty of murder or manslaughter according to the degree of negligence which he displayed, considering also the nature of the case in which he was acting.[90]

[89] Simpson's case, I Lewin, 172.
[90] Rice vs. State, 8 Mo., 561; Com. vs. Pierce, 138 Mass., 165.

The cases in illustration of the general principle now under consideration are innumerable.

ILLUSTRATIVE CASES.

A maker of cannon has been found guilty of manslaughter by reason of furnishing a piece in a very unsafe condition, by reason of which it burst when fired off and killed some of the bystanders.[91]

And a jailer who confined a prisoner in an unwholesome room, and neglected to supply him with necessaries for health and cleanliness by reason of which he contracted a disease from which he died was found guilty of murder.[92]

A boy who pulled the trapstick out of the fore part of a cart for mischief, by reason of which it upset while a sack of potatoes was being loaded into it, and the carter was thrown out backward and killed was found guilty of manslaughter.[93]

One having charge of a helpless infant who leaves it without food by reason of which it dies is guilty of murder.[94]

But if the same thing happens in the case of a partly grown-up child which might be expected to have some capacity to provide for itself it would only be manslaughter.[95]

Therefore we find the doctrine, as we have stated it, running through all the cases. The question of whether murder or manslaughter in a case of unlawful homicide depends upon the degree of wickedness

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[91] Rex vs. Carr, 7 C. & P., 163.
[92] Rex vs. Huggins, 2 Str., 882; 2 Ld. Raym, 1574.
[93] Rex vs. Sullivan, 7 C. & P., 641.
[94] Rex vs. Sanders, 7 C. & P., 277; The Queen vs. Instan., 9 Am. Cr., 416.
[95] Reg. vs. Edwards, 8 C. & P., 611.

of mind or recklessness of human life which is found in the particular case.

KILLING MORE THAN ONE PERSON BY A SINGLE ACT.

The courts have disagreed upon the question as to whether or not the killing of more than one person by a single act amounts to more than a single crime. In California it was held that the killing of three persons necessarily involved three offenses,[96] but in Indiana a contrary doctrine was laid down.[97]

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[96] People vs. Alibez, 49 Cal., 452; People vs. Majirro, 65 Cal., 138; 5 Am. Cr., 486.

[97] Clem vs. State, 42 Ind., 420; Ben vs. State, 22 Ala., 9; State vs. Tynon, 2 Tyler (Vt.), 387.

ASSAULTS.

CHAPTER V.

ASSAULTS — FALSE IMPRISONMENT — ABDUCTION — MAYHEM — RAPE — ARSON — BURGLARY.

An assault is a physical act of threatened violence against the person of another, which apparently might be accomplished, and if successfully accomplished, would effect a personal injury.[98]

To strike at another with, or without, a weapon, to point a loaded gun at another within carrying distance under circumstances that justify an apprehension of an intention to shoot, to throw a stone or other missile at another, to shoot at another, are familiar examples of assaults.[99] In order to constitute an assault it is not necessary that the threatened injury should be effected. An assault as above defined is an assault whether it accomplishes its purpose or not. If the threatened injury is effected it is still an assault, but it is also something more. Every crime of violence against the person, as rape, robbery, murder, begins with, and includes, an assault. And in most, if not in all, of the common law indictments for crimes of this character it was customary to al-

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[98] Johnson vs. State, 35 Ala., 363; State vs. Morgan, 3 Ired. (N. C.), 186.

[99] Hays vs. People, 1 Hill (N. Y.), 351; State vs. Cherry, 11 Ired. (N. C.), 475; State vs. Malcolm, 8 Iowa, 413; State vs. Smith, 2 Humph. (Tenn.), 457; Meder vs. Stone, 7 Metc., 147.

lege an assault as the first element of the crime charged against the prisoner. The manner of alleging the assault was not always the same. A recurrence to a couple of these forms will lead us naturally to some ideas which must be considered in connection with the crime under consideration. In an indictment for murder it was customary to allege that the prisoner, "in and upon A. B. in the peace of our Sovereign Lord the King then and there being, then and there feloniously, and wilfully, and of malice aforethought, did make an assault, and then and there, etc.," going on to describe what injuries were inflicted, and in what manner. The indictment for robbery followed the same form with an additional allegation as follows: "* * * then and there feloniously and wilfully did make an assault, and him, the said A. B., then and there in bodily fear and danger of his life feloniously did put, etc." The student will perceive that the words "in bodily fear" introduce the element of fear, and this is important to be observed because the courts have disagreed upon the question as to whether or not an act of threatened violence which could not by any possibility result in a physical injury does in fact constitute an assault, if, by means of it, the person against whom it is directed is put in fear. Suppose a man points a pistol which he knows is not loaded at another, within shooting distance, under circumstances which create a reasonable apprehension in the mind of the person against whom it is directed, that he intends to shoot, and thereby intentionally puts the person towards whom it is pointed in fear, is he, or is he not, guilty of an assault? It will readily be perceived that this question hinges upon the point whether or not there must be an actual attempt to do a physical injury in order to constitute the crime of assault, or

whether an attempt to accomplish the only injurious result which is ever effected by that which is merely an assault, namely, putting the assaulted person in fear, is sufficient to constitute an assault.

To the authors of this volume it is difficult to understand how any doubt could ever have been entertained upon this question. In a ruder and more barbarous age it might not have been understood as well as it is to-day that great injuries may be inflicted upon the physical system through fear, although the quotation from the form of the indictment for robbery would indicate that the common law considered an act of threatened physical violence, by which a person against whom it was directed was put in bodily fear, was a sufficient assault as an element in the crime of robbery. And, in the law relating to the crime of robbery, this principle is well settled. Therefore, calling the attention of the student to a case in which the question under discussion has been considered and decided differently [100] the authors do not hesitate to say that, in their opinion, an act of threatened violence, intended to put another in bodily fear, ought to, and does, constitute an assault, and the great weight of authority is that way.[101] The analysis will show that it comes strictly within the definition of a crime which has been given in a preceding portion of this volume.[102]

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[100] McKay vs. State, 44 Tex., 43 (S. C. 1 Am. Cr., 46); Chapman vs. State, 78 Ala., 463; 6 Am. Cr., 37; People vs. Dodel, 77 Cal., 293.

[101] Com. vs. White, 110 Mass., 407; State vs. Smith, 2 Humph., 459; State vs. Sims, 3 Strob. (S. C.), 137; State vs. Shepard, 10 Iowa, 126; Tarver vs. State, 43 Ala., 354; 2 Bish. Cr. Law, Sec. 53. See State vs. Glover, 27 S. C., 602; Territory vs. Keyes, 5 Dak., 244.

[102] It is not to be understood by this statement that an as-

Mere words do not constitute an assault.[103]

This principle is perfectly settled as a matter of authority. And, in view of this statement, it may not be a waste of space to discuss certain questions

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sault may not be committed, if the person threatened is not put in fear.

It is quite possible that there may be an assault even though the person assaulted had no fear at the time.

People vs. Lilley, 43 Mich., 521, 325.

The text does not here try to point out a test as to what amounts to an assault, but rather to point out to the student, that where there is an apparent present ability to carry into effect certain threatening physical acts which produce in the mind of the person assaulted a fear that a personal injury may be inflicted, the threatening act constitutes an assault, notwithstanding the fact that there was not an actual intention, or an ability, of the party making the threats to carry the same into effect. An example, perhaps, will indicate more clearly the difference of the rulings of the court in this respect.

In an Alabama case it was held that the pointing an unloaded gun at another, putting him in a terror, was not a criminal assault because there was not an actual present ability to carry into effect the threatened act.

Chapman vs. State, 78 Ala., 463; State vs. Napper, 6 Nev., 115.

On the other hand, other courts have held that the pointing of the unloaded gun in such a threatening manner as to put the other person in bodily fear, does of itself constitute an assault even though there was no intention or ability to discharge the gun.

See Morrison's case, 1 Broun, 394–5.

The reason of this latter ruling is stated in Com. vs. White, 110 Mass., 407–409, as follows:

"It is not the secret intent of the assaulting party, nor the undisclosed fact of his ability or inability to commit a battery, that is material; but what his conduct and the attending circumstances denote at the time to the party assaulted. If to him they indicate an attack, he is justified in resorting to defensive action. The same rule applies to the proof necessary to sustain a criminal complaint for an assault. It is the outward demonstration that constitutes the mischief which is punished as a breach of the peace."

[103] People vs. Bransby, 32 N. Y., 525. And words accom-

which may arise in the mind of the thoughtful student at this point. He may say, it has been stated that threatened violence which is intended to, and does, create a reasonable apprehension of personal injury and puts one in bodily fear, constitutes an assault. Mere words are perfectly capable of effecting this result. Why, therefore, is it said that mere words never amount to an assault?

This is perhaps as favorable an opportunity as will occur in this volume of making some general explanations, with regard to the criminal law, which will assist the student in arriving at correct conclusions in his further studies and in his future actual practice. The criminal law is a purely arbitrary branch of the law. Indeed, all law is more or less arbitrary; that is, it is law because the highest power in the State has settled that it is or shall be law. Nothing is law simply because one perceives that it is, or ought to be, law. It is law because it has been ordained by the highest power of the State to be law. And the evidence of what the law is must be found either in statutes, or in the decisions of the courts. The statutes make law; the decisions of the courts are simply evidence as to what the law is. In trying to reach a conclusion as to what the law is on a given state of facts, legal reasoning is used only for the purpose of reaching a conclusion where the case is not plain upon authority. In the domain of the criminal law this doctrine is especially applicable. Consequently no act is a crime at the common law

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panying a threatening act which disclaim any purpose to do an injury may deprive the threatening act of the character of an assault which it would otherwise possess. Com. vs. Eyre, 1 Serg., 1 R., 347; State vs. Crow, 1 Ired. (N. C.), 375; Johnson vs. State, 35 Ala., 363.

unless the decisions of the courts, or the settled principles of the law in analogous cases, show that it is a crime, it matters not how reprehensible may be the act nor how injurious it may be to an individual, or to the public. And under criminal statutes no act can be punished as a crime unless it comes, not only within the reason and spirit, but also within the letter, of the statute. Criminal statutes are usually construed with great strictness in favor of the accused.

It is settled by the decisions that mere words do not constitute an assault.[104] The threatened violence which is an element of the crime must be through the medium of a physical act.

On the other hand, it is not necessary that the physical act should be an attempt to inflict a direct injury upon the person of another. It is not necessary to strike or shoot or throw at a person directly in order to constitute the crime of an assault. Any physical force exerted in any act, the purpose and tendency of which is to inflict a violent personal injury upon another, is an assault. To explode a fire cracker, to stretch a rope across the path with intent that a person should trip over it, to strike his horse with the intent that he should run away, to put a deleterious drug in the food or drink of another,[105] these and all acts of a similar character are criminal assaults.

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[104] But a threatening act, coupled with a statement that an injury will be inflicted unless the threatened person does a certain act is an assault. Bloomer vs. State, 3 Sneed, 66; Keefe vs. State, 19 Ark., 190; State vs. Rawles, 65 N. C., 334; Hariston vs. State, 54 Miss., 392.

[105] State vs. Glover, 27 S. C., 602; U. S. vs. Ortega, 4 Wash. C. C., 531; State vs. Baker, 65 N. C., 332. Administering poison is an unlawful assault. Carr vs. State, 135 Ind., 1; 9 Am. Cr., 1.

An assault is an attempt to commit a crime, and, like all attempts, the gravity of the offense depends upon the intent with which the act is done, or, in other words, upon the result which is aimed at. An ordinary simple assault is an attempt to commit a battery.

WHAT A BATTERY IS.

Any unlawful touching of the person of another with a wrongful or injurious purpose is a battery, or as it is universally designated, an assault and battery. Spitting upon one, throwing dirt upon him, jostling him out of the way, striking the horse on which he is riding, cutting a lock of his hair: in short, any unlawful physical act or force set in motion which is intended to, and does, injuriously reach, directly or indirectly, the person of another is an assault and battery.[106]

An accidental injury is not a criminal assault and battery, neither is one given in sport, or in the progress of some athletic exercise, of which the law does not disapprove, where the circumstances indicate consent on the part of the person receiving the blow. But even consent does not relieve the giving of a blow from its criminal character where it is done in the course of that which the law forbids.[107]

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[106] People vs. Lee, 1 Wheeler C. C., 410; Purcell vs. Home, 8 Ad. & E., 602; Forde vs Skinner, 4 C. & P., 239; State vs. Elliott, 11 N. H., 540; Champer vs. State, 14 Ohio St., 437; People vs. Bransby, 32 N. Y., 525; but see Com. vs. Collberg, 119 Mass., 350; (S. C. 1 Am. Cr., 59).

[107] A consent obtained by fraud is no consent. Thus a man professing to act as a medical adviser fraudulently induces a girl to allow him to undress her by falsely alleging that it is necessary for medical treatment to do so.

R. V. Rosinski, 1 Russ. Cr., 959.

See Com. vs. Stratton, 114 Mass., 303.

So also consent to an assault must be by a person capable of consenting. Thus where a statute makes it criminal to

And, therefore, while no assault and battery is committed by blows given in a friendly bout at boxing, in a prize fight, both principals are guilty of assault and battery as well as of the graver statutory offense.[108]

UNNECESSARY SEVERITY.

There are some cases in which the law justifies a battery. A parent may lawfully punish a child,[109] a school-teacher may lawfully inflict moderate punishment upon a pupil of proper years,[110] the head of a prison, or the master of a workhouse, might justify reducing a refractory inmate to submission by physical punishment, and, at the common law, a man might lawfully administer moderate correction to his wife.[111] All of these cases involved corrective and vindictive punishment.

There are other cases in which the law justifies a battery in defense of one's personal rights or property rights. A man has a right to use force to eject an intruder from his premises, to defend himself or others from a threatened injury, to defend his property. The general principles governing these rights have been explained under the head of self-defense in the law of homicide. As said there, the force used must not be disproportionate to the occasion. Un-

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have connection with a young girl under a certain age, irrespective of any consent on her part if under such age, she is incapable of consenting to an assault with intent to have carnal knowledge.

State vs. Rollins, 8 N. H., 550; Murphy vs. State, 120 Ind., 115; People vs. McDowell, 8 Mich., 149.

[108] Com. vs. Collberg, 119 Mass., 351; State vs. Burnham, 56 Vt., 445.

[109] Johnson vs. State, 2 Humph., 283.

[110] Com. vs. Randall, 4 Gray, 36.

[111] 1 Bl. Com., 444. See Com. vs. McAfee, 108 Mass., 458; Com. vs. Wood, 97 Mass., 225.

necessary violence or unreasonable severity is criminally punishable.[112]

ASSAULTS WITH SPECIAL INTENTS.

The most common of these offenses are assault with intent to kill and murder, assault with intent to rob, assault with intent to ravish, assault with intent to maim or wound, and assault with intent to do grievous bodily harm. It is unnecessary in a volume of this character to enter upon a discussion of each of these crimes separately, but it will be sufficient to note certain general characteristics which all possess in common.

All of these assaults are attempts to commit the specific crime, the intent to commit which is charged. But the attempt must be by means of the assault charged. Since, then, they are attempts, the assault

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[112] Shorter vs. People, 2 N. Y., 193; Fletcher vs. People, 42 Ill., 395.

The doctrine that the right to defend one's person ends with the necessity, and that where one is justified in entering a conflict he would not be justified in using force after the necessity ceased to exist, and that any further violence would be a battery, has been modified in Michigan to this extent, in a decision by Judge Campbell:

"The law has enough regard for the weakness of human nature to regard a violent attack as sufficient excuse for going beyond the mere necessities of self-defense and chastising the transgressor within such bounds as do not exceed the natural limits of the provocation. * * * It would encourage and not restrain violence to allow a man to put the safety of others in danger by actual violence and offensive assaults, and then save himself from punishment by stopping retaliation as soon as his adversaries get the better of him. When a man is provoked by another, the offender runs the risk of suffering to the extent of the provocation; and while the law never sanctions the use of force beyond what was naturally provoked, it does not keep all its tenderness for the wrongdoer who begins the mischief."

People vs. Pearl, 76 Mich., 207.

must be committed with the specific purpose and intent to commit the crime named. Thus, in assault with intent to kill and murder, there must be a specific design and purpose to kill, and, unless this is found by the jury, there can be no conviction, no matter how dangerous to life the assault may be.[113] So, also, the assault must have been committed under such circumstances as would make the killing murder if death had resulted.[114] There are, as we have seen, unlawful, wilful and intentional killings which do not amount to murder, and it is obvious that there can be no intent to murder where there is an intent to kill, if the killing would not be murder if the assaulted person should die.[115] So in all other assaults with specific intent, there must always exist a specific purpose and intent to commit the crime named, and it must be found as a fact, and cannot be attributed as a matter of legal inference.

FALSE IMPRISONMENT.

False imprisonment is the unlawful restraint of a person's liberty.

At common law, false imprisonment is a misdemeanor. There are two requisites to constitute the offence.

First, there must be a detention of the person, and second, such detention must be unlawful.

It is not necessary that the person be confined within a prison or other building, or that he be assaulted or even touched, but any unlawful detention,

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[113] Carter vs. State, 28 Tex. App., 355, 13 S. W. Rep., 147.

[114] Wilson vs. People, 24 Mich., 410; Wright vs. People, 33 Mich., 306.

[115] Maher vs. People, 10 Mich., 212; Com. vs. Merrill, 14 Gray., 415; State vs. Kendall, 73 Iowa, 255; Moore vs. State, 79 Wis., 546.

even for a moment, of the body of another without his consent, by actual force, or threats, amounts to false imprisonment.[116]

All detentions are unlawful unless authorized or sanctioned by law, and the detention will be presumed to be unlawful until the contrary is shown.[117]

An officer who makes an arrest without lawful authority is guilty of the offense.[118]

KIDNAPPING.

At common law, according to the definition of Blackstone, kidnapping was the forcible abduction or stealing away of a man, woman or child from their own country, and sending them into another.[119]

This definition has been generally accepted in this country, with the modification that the sending to a foreign country is not an essential element of the offense. Thus it has been held in New Hampshire that a removal from the state is not necessary to constitute the offense.[120] With this modification the student will notice that the offense is very similar to that of false imprisonment. According to the best authorities, kidnapping is a false imprisonment, aggravated by the carrying away of the person imprisoned.[121]

Under the statute in Illinois which adopts the definition given by Blackstone, it was held that it was not necessary that physical force or violence should be used on the person kidnapped, since any

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[116] Floyd vs. State, 12 Ark., 43.
[117] Kerbie vs. State, 5 Tex. App., 108.
[118] Francisco vs. State, 24 N. J. Law, 30; Vanderpool vs. State, 84 Ark., 174.
[119] 4 Blk. Com., 219.
[120] State vs. Rollins, 8 N. H., 550.
[121] 2 Bishop Cr. Law, Sec. 750.

false excitement of fears by threats, frauds, or other means which amount to a coercion of the will, is sufficient.[122]

The consent of the person kidnapped if of mature years and sound mind, in the absence of duress or fraud, is a good defense to the charge of kidnapping, but the consent of a child or a person of unsound mind, incapable of giving a valid consent, is no defense.[123] It is a misdemeanor at common law.

ABDUCTION.

Abduction is an offence entirely regulated by statute. It was first made a crime under a statute of Henry VII., which enacted that "if any person shall for lucre take away a woman, being maid, widow, or wife, and having substance, either goods or lands, or being heir apparent to her ancestors, contrary to her will, and afterwards she be married to such misdoer, or by his consent to another, or defiled, such person, his procurors or abettors, and such as shall knowingly receive said woman, shall be deemed principal felons." [124]

The statutes of the different States, while they are modeled after the above statute, differ materially as to what acts constitute the crime. The student must therefore consult the statutes of his own State.

As a general thing the statutes provide that any person who shall take away any woman unlawfully

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[122] Mood vs. People, 2 Bishop Cr. L., Sec. 750; Payson vs. Macomber, 3 Allen, 69; Hadden vs. People, 25 N. Y., 373; 2 Bish. Cr. L., Sec. 766; People vs. De Leon, 109 N. Y., 226; 7 Am. Cr., 314.

[123] Com. vs. Nickerson, 5 Allen (Mass.), 518; Gouette vs. Farar, 41 N. H., 53; State vs. Bollins, 8 N. H., 550.

[124] 4 Blk. Com., 208; 24 and 25 Vic. C., 100.

and against her will, wth intent to compel her by force, menace, or duress, to marry him or any other person, or to be defiled, or any person who shall take or entice away a female under a certain age (usually sixteen years of age), out of the possession and against the will of her parents or any other person having lawful charge of her, for the purpose of prostitution,[125] marriage or concubinage,[126] shall be guilty of the offense.

The enticement of a female under the age prescribed by the statute may be accomplished either by open solicitations or by conduct which, while avoiding a direct solicitation, is equivalent to such a proposition and which is designed to induce her to go.[127]

Under some circumstances the offense may be continuous. Thus, where the defendant abducted a female under the required age from one State to another, and by interposing his will between her and her guardian's control, he overcame her intention to return home, an abduction was accomplished in the State where such persuasion took place.[128] The gravamen of the offense is the purpose or intent which accompanies the abduction. The offense is complete the moment the subject of the crime is re-

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[125] People vs. Cummins, 56 Mich., 544; Brown vs. State (Md.), 20 Atl. Rep., 186. The purpose of prostitution means the design to introduce her to a promiscuous intercourse with men, and a man enticing away for his own carnal enjoyment only does not amount to prostitution. State vs. Brow, 64 N. H., 577; Com. vs. Cook, 12 Met., 93. In People vs. Cummins, 56 Mich., 544, the court held that the words prostitution or concubinage cover all cases of lewd intercourse.

[126] State vs. Overstreet, 43 Kans., 299; see also State vs. Richardson, Md. Sup., 23 S. W. Rep., 769.

[127] People vs. Carrier, 46 Mich., 442.

[128] State vs. Gordon, 46 N. J., 432; 4 Am. Cr., 1.

moved beyond the control and power of her parents, or others having lawful charge of her, whether any illicit intercourse takes place or not. Subsequent acts are only important as affording the most reliable means of forming a correct conclusion with respect to the original purpose and intention of the accused.[129]

If the female taken away is under the age prescribed by the statute, her consent thereto is no defense,[130] neither is the fact that the offender supposes in good faith that the girl is over the required age.[131]

The courts of those States which require forcible abduction have held that if the mind of the person abducted is operated upon by fears, threats, fraud, or undue influence, amounting to a coercion of the will, that the offense is committed.[132]

MAYHEM.

Mayhem, at common law, is the violently depriving another of the use of such of his members as may render him less able in fighting, either to defend himself, or to annoy his adversary.[133]

At common law it did not include injuries which merely disfigured without diminishing fighting abilities, but consisted only of those injuries which

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[129] Henderson vs. People, 124 Ill., 607; 8 Am. Cr., 5; People vs. Plath, 100 N. Y., 590; 6 Am. Cr., 1.

[130] Scruggs vs. State, 90 Tenn., 81; State vs. Keith, 47 Minn., 559.

[131] State vs. Houx, 109 Mo., 654; People vs. Dolan, 96 Cal., 315; State vs. Ruhl, 8 Ia., 447; State vs. Newton, 44 Ia., 45. Neither is it a defense that the female taken for concubinage was not chaste. State vs. Johnson, 115 Mo., 480; 9 Am. Cr., 7; People vs. Demoussett, 71 Cal., 611; 7 Am. Cr., 1; Reg. vs. Prince, 2 Cr. Cas. Res., 154; 1 Am. Cr., 1.

[132] Moody vs. People, 20 Ill., 315.

[133] 4 Bl. Com., 205.

rendered a man less able in disabling his adversary or in defending himself.

Thus, disabling a man's hand, or finger, or striking out of an eye, or tooth, or castration, are maims, but the cutting off of an ear or nose are not such at common law.

The offense has been extended by statute both in England and America. In the reign of Charles II. the Coventry act was passed, which enacted, "That if any person shall on purpose, and of malice aforethought, or by lying in wait, unlawfully cut out or disable the tongue, put out an eye, slit the nose, cut off a nose or lip, or cut off or disable any limb or member of any subject of his majesty, with intention in so doing to maim or disfigure, in any of the matters before mentioned, such his majesty's subjects, that then and in every such case the person or persons so offending, their counsellors, aiders and abettors, knowing of and privy to the offense as aforesaid, shall be and are by the said statute declared to be felons, and shall suffer death as in cases of felony without benefit of clergy."

The statutes in this country largely follow the English statute quoted, so that the offense now includes not only acts which disable and diminish the fighting abilities, but also any mutilation of another person with malicious intent.

Under the English statute it was necessary to show that the defendant committed the offense as a result of premeditated design, by lying in wait, and the disabling or mutilation of another person on the impulse of the moment, in a sudden affray, was not sufficient to make him guilty of the offense.[134]

[134] A similar construction has been placed upon the statute in New York. Godfrey vs. People, 63 N. Y., 207.

As a general rule in this country, it is not necessary that there should be a lying in wait, or that the act should be premeditated prior to the time it was committed, providing the act is committed with a malicious intent to mutilate or disable; and this is true even though such intent was formed in the progress of a conflict.[135] A maim inflicted which is not the result of a malicious intent does not make one guilty of the offense. As a general rule the statutes also punish an assault with intent to maim.

Mayhem was considered to be a felony at common law since, anciently, castration was punishable by death, and other maims by the loss of member for member.[136]

In this country mayhem is not considered to be a felony unless committed by castration.[137]

RAPE.

Rape is the unlawful carnal knowledge of a woman by force and against her will, accomplished in spite of the utmost power of resistance of which the woman is capable.[138]

By unlawful is meant that the man and the woman are not married. A husband is not guilty of rape in having intercourse with his wife by force and against

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[135] People vs. Wright, 93 Cal., 564; State vs. Skidmore, 87 N. Car., 509.

[136] Bishop Cr. Law., Sec. 1008.

[137] Bishop Cr. Law, Sec. 1008; Com. vs. Newell, 7 Mass., 245; Adams vs. Barrett, 5 Ga., 404; State vs. Absence, 4 Port. (Ala.), 397.

[138] In the definition the words "accomplished against the utmost power of resistance of which the woman is capable" are added to the definition which is given by most of the text-writers. It is believed that this phrase will give the student a clearer idea of an essential element of the crime.

her will, although he may be guilty of rape on his own wife by assisting another to ravish her.[139]

PENETRATION IS SUFFICIENT.

The complete sexual act consists in penetration and emission, and it was at one time supposed that both of these elements were necessary to constitute the carnal knowledge which is an element in the crime of rape. But this opinion was long since discarded, and it is now the settled law that penetration is alone sufficient, and, also, that this penetration need not be in any sense complete, but that the slightest penetration of the male organ into the female organ constitutes carnal knowledge within the meaning of the definition.[140]

AGE OF ACCUSED.

It was at one time said that there was a conclusive presumption of law that a male under the age of fourteen years could not be guilty of rape.[141] But the prevailing doctrine now is against the existence of any such presumption, and that it is in all cases a question of fact whether or not the physical capacity existed, and whether or not a rape was in fact committed.[142]

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[139] Audley's case, 3 State Trials, 401; People vs. Chapman, 62 Mich., 280; 7 Am. Cr., 568.

[140] State vs. LaBlanc, 1 Tread., 354; Brauer vs. State, 25 Wis., 413.

[141] Reg. vs. Phillips, 8 Car. & P., 736; State vs. Sam, Winston (N. C.), 300; Com. vs. Green, 2 Pick., 380; Williams vs. State, 20 Fla., 777; 5 Am. Cr., 612.

[142] Williams vs. State, 14 Ohio, 222; Wagoner vs. State, 2 Lea (Tenn.), 352.

THE WOMAN'S RESISTANCE.

In order that carnal knowledge shall constitute rape there must be the utmost and continued reluctance upon the part of the woman. The phrase used in the common law indictments for this crime is that it was done "by force and against her will." But this language does not adequately describe the degree of reluctance and resistance which the law demands. The woman must guard her own virtue, and, though she resists at first, if she finally yields, or even ceases to resist while she is able to resist further, the act is not rape,[143] unless, indeed, she has ceased to resist because her will was overcome by fear.

SUBMISSION THROUGH FEAR.

In rape, as in robbery, menace and threats may take the place of actual violence, and where a woman's will is overcome because she is afraid of being killed or of very grievous bodily injury, the act is as truly rape as though accomplished by purely physical force.[144]

INCAPACITY OF RESISTANCE.

By the words, "utmost power of resistance," in the definition, is intended the utmost power of resistance of which at the time and under the circumstances the woman is capable. Therefore, it is regarded as rape to have carnal knowledge of a woman who is in a state of insensibility at the time, whether she has been rendered so by drink or drugs administered for that purpose, or from any other cause.[145] So, also, it

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[143] People vs. Doehring, 59 N. Y., 374; Whittaker vs. State, 50 Wis., 519; 3 Am. Cr., 391.

[144] Millet vs. People, 42 Mich., 262.

[145] Rex vs. Ryan, 2 Cox. Cr. Cas., 115. And a conviction for rape was upheld where the woman was in a natural sleep in bed with her husband. Reg. vs. Young, 14 Cox. C. C., 114.

is rape to have carnal knowledge of a woman who by reason of idiocy or dementia has manifestly no will to oppose to the act. But it is only in extreme cases of this nature that a deficiency of mental capacity is allowed to excuse a lack of resistance.[146]

CONSENT OBTAINED BY FRAUD.

Where there is consent there is no rape, however fraudulently the consent may have been obtained. Therefore, it is not rape for a man to have carnal knowledge by personating another man, the woman at the time consenting, under a mistaken belief as to the identity of the man, by whatever fraudulent means this mistake has been brought about.[147] But if the woman submits, not understanding the nature of the act, but in the belief that it is an act of surgery without the performance of which her life will be in danger, it is rape.[148]

AGE OF CONSENT.

Girls under what is commonly called the age of consent are also regarded by law as having no intelligent will to oppose to the criminal act, and carnal knowledge of such a one is rape whether in fact the act was consented to or not.

The age of consent at the common law was ten years, at which it still remains in some of the States. But most of the States have raised the age of consent by statute. In Michigan, for instance, sexual intercourse with a woman under the age of sixteen years is rape, however freely the act is consented to by the woman, and whatever her character.

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[146] People vs. Crosswell, 13 Mich., 427; Reg. vs. Barrett, 12 Cox. Cr. Cas., 498; Reg. vs. Fletcher, 10 Cox. Cr. Cas., 248.

[147] Reg. vs. Clarke, 6 Cox. Cr. Cas., 412; State vs. Murphy, 6 Ala., 675; People vs. Royal, 53 Cal., 62.

[148] Reg. vs. Flattery, 2 Queen's Bench Div., 410; 3 Am. Cr., 454; Don Moran vs. People, 25 Mich., 356.

YOUNG GIRLS.

In the case of very young girls the courts do not require the same proof of violent and continued resistance as in the case of mature and experienced women.[149]

CHARACTER OF THE WOMAN.

The character of the woman is in rape of no consequence, nor are the previous relations between the parties important. It is as much rape to have carnal knowledge of a prostitute by force and against her will as of the most virtuous of women.[150] And it is also true that although a woman may have yielded to her ravisher on many previous occasions, yet if she resisted the act involved to the extent of her power, it is rape. The character of the woman and the previous relations between the parties are only regarded as circumstances, which may assist in determining whether in fact, on the occasion charged, there was that reluctance and resistance which is an essential ingredient in the crime of rape.[151]

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[149] Stephens vs. State, 11 Geo., 225; State vs. Niles, 47 Vt., 82; People vs. Lynch, 29 Mich., 274; Maillet vs. People, 42 Mich., 262; 3 Am. Cr., 379.

[150] Anderson vs. State, 104 Ind., 467; 5 Am. Cr., 601.

[151] People vs. Crego, 70 Mich., 319; State vs. Reed, 39 Vt., 417; Carney vs. State, 118 Ind., 525.

ARSON.

Arson at common law was the wilful, and malicious burning of the dwelling house of another.

At common law a man's habitation was regarded as sacred. It was called his castle, and for its safety and security the law had an especial regard.

The offense of arson is considered as one that violates the sanctity and the security of the habitation, and for this reason is a more atrocious offense than if it were viewed as simply a crime against property.[1]

DWELLING HOUSE.

The term dwelling house in its legal sense includes not only the house occupied by the family for domestic purposes, but all the outhouses within the curtilage,[2] being such buildings as burglary may be committed in at common law.[3] In England the dwelling and outhouses were usually surrounded by a fence or stone wall enclosing a small piece of land embracing the yard and outbuildings near the house, constituting a court, and this enclosure was called the curtilage. Since such enclosures now are not common, the term now includes all buildings which, although not enclosed by a fence or wall, are part and parcel of the dwelling house and used in connection therewith.[4]

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[1] Snyder vs. People, 26 Mich., 105.

[2] Com. vs. Barney, 10 Cush., 487.

[3] Pitcher vs. People, 16 Mich., 142.

[4] A barn eighty feet from the dwelling in a yard or lane with which there was a communication from the house by a pair of bars, was held to be within the curtilage. People vs. Taylor, 2 Mich., 251; Pitcher vs. People, 16 Mich., 142; People vs. Aplin, 86 Mich., 393; Com., vs. Barney 10 Cush. (Mass.), 480; Washington vs. State, 82 Ala., 31. But if a highway separate the barn from the dwelling house, it is not within the curtilage. Curkendall vs. People, 36 Mich., 309.

Any building will be considered to be a dwelling within the intent of the law if it be actually occupied as such.[5]

The dwelling must be occupied, but it is not necessary that the person inhabiting it should be present at the time of the burning, provided it contains his effects and he intends to return after a temporary absence.[6]

The offense being one against the habitation, it follows that the burning of a vacant house does not violate the security of any one and is not arson at common law. Of course if the burning of a vacant house be done with the intent that the fire shall spread so as to burn the house of another, or under such conditions that the house of another would probably be burned, the crime is committed.[7]

The dwelling must be the habitation of another.

At common law the ownership or occupancy of premises burned was material.

The burning of one's own house, since it did not violate the security of the habitation, was not arson at common law.[8]

This statement is subject to the limitation that if the setting fire to one's own house is done with the intent to burn the dwelling of another, or under such circumstances that the dwelling of another would probably be burned, then the offense of arson is committed.

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[5] Com. vs. Barney, 10 Cush., 487.

[6] Stupetske vs. Fire Ins. Co., 43 Mich., 373; Johnson vs. State, 48 Ga., 116; State vs. Toole, 29 Me., 30.

[7] Woodford vs. People, 62 N. Y., 153; Hooker vs. Com., 13 Gratt. (Va.), 763; State vs. McGowan, 20 Conn., 245; State vs. Warner, 33 Me., 30; People vs. Handley, 93 Mich., 146.

[8] State vs. Hannet, 54 Vt., 83; 4 Am. Cr., 38.

The occupant of the house is considered for the purpose of the crime of arson to be the owner. The house in the indictment is described, not as the house of the owner in fee (if he does not occupy it), but as the dwelling house of him whose dwelling it then is.[9]

At the common law the wife, because of her legal identity with the husband, could not be guilty of the crime of arson in burning her husband's dwelling. So, also, a house owned by the wife, but occupied by the husband and wife jointly, was not the dwelling of another, the burning of which by the husband would make him guilty of arson.

BURNING.

To constitute the crime there must be an actual burning of the house or some part of it.

It is not necessary that the house be consumed or partially destroyed. It is sufficient if there is a burning, however slight.[10]

THE BURNING MUST BE WILFUL AND MALICIOUS.

Mere negligence or mischance will not make one guilty of the offense.[11] The malicious burning, however, need not in all cases be a result corresponding with the precise intent of the defendant. Thus if one intending to set fire to the house of A, should accidentally set fire to the house of B, he is guilty of arson. So, also, he will be guilty of the offense, al-

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[9] Snyder vs. People, 26 Mich., 105.

[10] A mere charring will suffice; Com. vs. Tucker, 110 Mass., 403; People vs. Haggarty, 46 Cal., 354. But a mere scorching is not enough; Woolsey vs. State, 30 Tex. App., 346; 17 S. W. Rep., 546; State vs. Hall, 93 N. Car., 571.

[11] Winslow vs. State, 76 Ala., 42; 5 Am. Cr., 43.

though he had no intention of setting fire to anything, providing he accidentally sets fire to the dwelling of another in intending and attempting to commit a felony of a different nature.

If, however, the dwelling be burned as an unintended result of an act or intent which would constitute an offense less than a felony, it would not constitute the crime of arson.

STATUTORY BURNINGS.

Most of the statutes of the various States make it an offense to burn one's own house, or for the wife to burn her husband's house, and vice versa. Many of the statutes also make it an offense to burn other buildings than the dwelling, such as school houses,[12] shops, warehouses,[13] churches,[14] grist mills,[15] and in some States the burning of any building is made punishable.

There are also statutes punishing the burning of insured property with the intent to charge the insurer.[16]

BURGLARY.

Burglary consists in the breaking, and entering, of the dwelling house of another, in the night-time, with intent to commit a felony therein.

Burglary is one of the ancient common law crimes, and has always been regarded in our law as an atrocious crime. The English people have always regarded a man's dwelling as something specially sacred. It is his castle, where he may dwell in peace

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[12] Wallace vs. Young, 5 I. B. Mon. Ky., 156; Hill vs. Commonwealth, 98 Pa. St., 192.

[13] Allen vs. State, 10 Ohio St., 287; Grimes vs. State, 63 Ala., 166.

[14] Hudson vs. State, 61 Ala., 33.

[15] Garrett vs. State, 109 Ind., 527.

[16] Heard vs. State, 81 Ala., 55; 7 Am. Cr., 74.

and safety, and from which he may exclude even an officer of the law armed only with civil process.

An attempted burglary may be resisted to the utmost extent, and the killing of one attempting to break into the dwelling house at night time with intent to commit a felony, where necessary to prevent it, is not a crime.

BREAKING.

Breaking means the making (not the enlarging unless by an actual breaking), of an opening in the dwelling house for the purpose of making an entry.

The word breaking used in defining the crime of burglary is liable to misconstruction. Breaking in the sense in which it is here used means only the making of an opening for the purpose of entering, so far as is necessary for that purpose. The law does not require the citizen to keep his doors or windows bolted and barred, nor even that there should be any fastening that it is necessary to "break" in order to obtain admission.[17] Therefore it is as much a breaking, within the meaning of the law against burglary, to lift the latch of a door which is shut and open the door, as it would be to take a crow-bar and force open a door which was locked and bolted.[18]

And it is a breaking within the meaning of the law even to push open a swinging transom window, which is not fastened, and is kept in its place merely by its own weight.[19]

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[17] Raising an unfastened window is breaking. State vs. Boon, 13 Ired. (N. C.), 244.

[18] State vs. Groning, 33 Kan., 18; McCourt vs. People, 64 N. Y., 583; The People vs. Nolan, 22 Mich., 228.

[19] Dennis vs. People, 27 Mich., 151.

And it is also held to be a breaking to enter a house by means of a chimney, because this is an opening which necessarily exists in order that the building may be occupied as a dwelling house.[20]

But if a door or window is already partly opened, it is not a breaking either to push a door wide open or the window further up, so as to make a sufficient space through which the house may be entered.[21] In order that there should be a breaking, so as to constitute the crime of burglary, the house must have been shut at the place where the entry was made. But it appears to be the law that where an aperture, already existing, is enlarged by an act which amounts to an actual breaking in the ordinary sense, this is a sufficient breaking to constitute the crime of burglary. And, therefore, in a case where it appeared that there was a window already broken by accident, and one of the prisoners broke out the rest of the pane so that he might be able to undo the window fastening, this was held to be sufficient breaking to constitute burglary.[22]

OPENING AN INNER DOOR.

It is also the law that the breaking requisite to constitute burglary is not confined to the external parts of the house, but may be of an inner door, if the prisoner has obtained entrance to the house through an outer door already opened.[23]

Besides an actual breaking, as this has been explained, there may be a constructive breaking, that

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[20] Rex vs. Brice Russ. & Ry., 450; Walker vs. State, 52 Ala., 376.

[21] Com. vs. Strupney, 105 Mass., 588.

[22] Rex vs. Robinson, 17 Moody Cr., 327; Miller vs. State, 77 Ala., 41; Reg. vs. Bird, 9 Car. & P., 44.

[23] Rolland vs. Com., 85 Pa. Stat., 66; 3 Am. Cr., 35; State vs. Scripture, 42 N. H., 485.

is, procuring a door to be opened by means of some fraud or artifice, for the purpose of gaining an entrance to commit a felony. This is in analogy with the law of larceny in which there may be a constructive trespass, where possession of the stolen property is obtained by fraud — that is, obtaining possession of the stolen property by a fraudulent artifice. Where the prisoner pretended to have business with the occupant of a dwelling house, and thus gained admission for the purpose of committing a robbery, it was held to be a constructive breaking sufficient to support an indictment for burglary.[24]

And so in another case where the prisoner procured the door of the house to be opened by claiming that he was sheriff of the county, and had come to serve a subpoena, it was held that this was a sufficient breaking to constitute the crime of burglary. And there may be a constructive breaking where the door is opened by those in the house in consequence of fear induced by threats and menace of the burglar.[25]

BREAKING OUT.

Where one has, without breaking, entered a house for the purpose of committing a felony, he is by some courts held to be guilty of burglary, in breaking out of the house to effect his escape. That is, in such a case, any act which would amount to a breaking for the purpose of entering, is a breaking when done for the purpose of escaping.[26] But it is said that in or-

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[24] Rolland vs. Com., 85 Pa. St., 54; State vs. Henry, 9 Ired. (N. C.), 463; Johnston vs. Com., 85 Pa. St., 622; 3 Am. Cr., 30. Entry by means of an accomplice inside. State vs. Rome, 98 N. C., 629.

[25] Rex. vs. Swallow, 2 Russell on Crimes, 9.

[26] State vs. Ward, 43 Conn., 489; 2 Am. Cr., 27; Contra Brown vs. State, 55 Ala., 123; Rolland vs. Com., 85 Pa. St., 66.

der to convict of burglary, on such a state of facts, the indictment should allege the facts as they actually occurred, and that the ordinary form of indictment for burglary is insufficient.[27]

ENTERING.

An entering, in the definition of burglary, means an actual going into a dwelling house by the burglar, or the introduction of some part of his body within the house, or even the introduction into the house of some instrument or implement, by means of which it is intended to commit the felony which is meditated.

The least degree of entering with any part of the body, or with any instrument, which is thrust in for the purpose of accomplishing the felony, is a burglarious entry. Where the prisoner raised the window and held it so that his fingers were within the house, his elbows resting upon the sill of the window, this was held to be a burglarious entry.[28]

And the putting in of a hook or other instrument to steal, or a pistol to kill, is an entry, although no part of the hand in which it is held be within the dwelling house.[29]

But in order that the putting of an instrument within the house should be held to be an entry, it is necessary that its introduction should be for the purpose of committing the felony, which is the ultimate purpose of the burglary. If it is simply an instrument which is thrust in for the purpose of accomplishing the breaking, this is not an entry in the sense in

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[27] State vs. McPherson, 70 N. C., 239.
[28] France vs. State, 42 Tex., 278; Com. vs. Glover, 111 Mass., 395.
[29] 1 Hale P. C., 555.

which this word is used in defining the crime of burglary. Thus, where the thieves in making a hole through the door with a centre-bit, thrust the centre-bit through the hole into the house, it was held that this was no entry.[30]

DWELLING HOUSE.

By dwelling house is intended every building which is a regular habitation of man.

In order to constitute a building a dwelling house within the meaning of this term as it is used in the definition in the crime of burglary, it is necessary that it should be intended and used as a dwelling — that is, as the place in which a man or a man and his family lives as a habitation. Whatever building, or part of a building, is occupied in this way is a dwelling house within the meaning of the law. It is the nature and the character of the occupation which determines whether or not a building, or a part of a building, is a dwelling house or not. If an employe lodges in a warehouse merely for the purpose of watching the goods, this does not make it a dwelling.[31]

Yet if the owner or an employe — as, for instance, a porter or a clerk — has a room fitted up in a building and occupies it as his dwelling,[32] the building would be in law his dwelling house within the meaning of the word as used in the definition of this crime.[33]

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[30] Rex vs. Hughes, 2 E. P. C., 49. See Walker vs. State, 63 Ala., 49.

[31] Rex vs. Smith, 2 E. P. C., 497. But see State vs. Williams, 90 N. C., 724.

[32] A room in a hotel occupied by one who is not a guest of the hotel, but who rents the room by the week, is the dwelling house of the roomer and not of the hotelkeeper. State vs. Johnson, 4 Wash., 592; 9 Am. Cr., 145; and see Smith vs. People, 115 Ill., 17; 6 Am. Cr., 80.

[33] State vs. Potts, 75 N. C., 364; Moore vs. People, 47 Mich., 639.

It is not necessary to constitute a dwelling that the whole building should be used for this purpose, nor even that its chief use be that of a dwelling; it is sufficient that any part of the building is used as a dwelling house.

The loft of a coach-house and stable which is used as the dwelling of the coachman is his dwelling house, although the chief purpose of the building is that it may be used as a stable and a coach-house.[34]

And a public jail is considered in law to be a dwelling house.[35]

If any part of a building is used for a dwelling, every part of the house to which there is an internal communication from the part used as a dwelling is a part of the dwelling house.

Thus the store-house, in part of which a clerk sleeps, is a dwelling house, and is a subject of the crime of burglary.[36]

It is not necessary that there should be any person within the house at the time of the breaking.

A mere temporary absence from a dwelling of the occupier, and of all of his family, does not destroy the character of the building as a dwelling house. It still remains a subject of the crime of burglary.[37]

To break into the room of a roomer, or, as it is usually called in legal phrase, a lodger, is burglary, even though this happens during his absence.[38]

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[34] Rex vs. Turner, 1 Leach., 305.
[35] People vs. Cowteral, 18 Johns., 115.
[36] State vs. Williams, 90 N. C., 724.
[37] Wilde vs. Com., 2 Metc. (Mass.), 408; Stupetske vs. Ins. Co., 43 Mich., 373.
[38] Rex vs. Evens Cro. Cer., 473; Mason vs. People, 26 N. Y., 200; State vs. Clark, 42 Vt., 629.

On the other hand, a house which is not regularly used as a permanent habitation, or which the owner visits only once or twice a year, and during his visit sleeps and eats in it for about a week, is not such a dwelling house, that the breaking and entering of it, when no person is occupying it, is burglary.[39]

CURTILAGE.

Besides the dwelling house itself, every building within the curtilage which is used in connection with the dwelling house for domestic purposes, is considered in law as a part of the dwelling; and breaking and entering it in the night time with the intent to commit a felony is as much burglary as the breaking and entering the dwelling house proper.

Thus it has been held that one who broke into a barn which was in the same yard with the house and used for domestic purposes, was guilty of burglary.[40]

To construe the term dwelling house to include the buildings within the curtilage, which are used for domestic purposes, is for the peace, repose and safety of families in the night time, and because the forcible breaking into them during the hours naturally given up to rest would cause alarm, distress and danger, and because one must be considered as within his dwelling house, in going in the night time into any of the buildings used in connection with it for domestic purposes. The word curtilage does not necessarily mean that all of the buildings are within the same enclosure, but it does mean that they are near to-

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[39] Scott vs. State, 62 Miss., 781; 5 Am. Cr., 98.
[40] Pitcher vs. People, 16 Mich., 142.

gether, and that there is no barrier or highway between the out buildings and the dwelling house proper.[41]

The dwelling house must be the dwelling house of another; but as in the law of arson, this has reference to occupancy and not to legal ownership.

This proposition is so self-evident that the courts in this country have not yet been called upon to decide that no man is guilty of burglary in breaking into a house which is his lawful dwelling, for whatever purpose.

Under this head it is to be said that the common law fixes no hour when the day ceases and night begins. It is simply, so far as the law of burglary is concerned, a question of light and darkness. By light is meant sunlight and not moonlight, nor any artificial light.[42]

The breaking and entering must be in the night time.

The law recognizes no middle space between day and night; where one begins the other ends.[43]

The test usually given by the authorities as to when it is dark and when it is light, and when it is night and when it is day, for the purpose of the law of burglary, is this: If sufficient light of the sun remain so that the features of a man may be reasonably discerned it is still day, otherwise it is night.[44]

Both the breaking and the entering must take place in the night time, else the crime of burglary is

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[41] Pond vs. People, 8 Mich., 150; State vs. Hecox, 83 Mo., 531; 5 Am. Cr., 98.

[42] Thomas vs. State, 5 Howell (Miss.), 20.

[43] State vs. Bancroft, 10 N. H., 105.

[44] State vs. Norris, 47 Mon., 197.

not committed. But it is not necessary that the breaking and entering should both occur in the same night; for if the house is broken into in one night, and the same one who broke should enter on the following night through the place where he broke the house the night before, he is guilty of burglary, because the original breaking was for the purpose of effecting an entry.[45]

To constitute burglary there must be an intent to commit some felony in the house, but if the breaking and entering is done with that intent, burglary is committed, although, in fact no felony is perpetrated.[46]

If the person breaking and entering the house merely intends to commit a trespass it is no burglary, even though after he is in the house he may commit a felony which he did not intend at the time he broke and entered.

The intention to commit a felony must concur in point of time with the breaking and entering, and the breaking and entering must be for that express purpose.[47]

That there must be an actual intent to commit a felony in order to constitute the crime of burglary is curiously illustrated by a decision in California. The prisoner requested A to commit a burglary with him. A informed a sheriff, and it was arranged between A and the sheriff that the burglary should be carried out. A entered the building, robbed it and divided

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[45] Rex vs. Smith, Russ. & Bryant, 417; Com. vs. Glover, 111 Mass., 395; People vs. Gibson, 58 Mich., 368.

[46] Hunter vs. State, 29 Ind., 80; State vs. Beal, 37 Ohio St., 108.

[47] Com. vs. Hewall, 7 Mass., 247; State vs. Cooper, 16 Vt., 55; see State vs. Moon, 12 N. H., 42.

the money with the prisoner, who was thereupon arrested by the sheriff. It was held that since A had no felonious intent in breaking and entering the building that the crime of burglary had not been committed, and, therefore, the prisoner could not be convicted of that crime, although he would have been guilty of the crime if A had not informed the sheriff, a circumstance of which the prisoner was entirely unaware.[48]

This case furnishes another instance of a principle to which attention has been called in the law of false pretenses, that is, that a man may have all the moral guilt of a crime without incurring its legal penalty, owing to some fact or circumstance of which he is unaware, and which he did not take into consideration, if that fact or circumstance made it impossible as matter of law, to commit the intended crime.[49]

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[48] People vs. Collins, 53 Cal., 185.
[49] For a discussion of this principle see ante p. 94.

LARCENY.

CHAPTER VI.

LARCENY — EMBEZZLEMENT — FALSE PRETENSES.

Larceny is the technical legal term for stealing. It consists in the felonious taking, and carrying away, of the personal property, goods and chattels, of another, with the intent to deprive the owner of his property permanently.

By a felonious intent is meant the intent to do the act which the law denounces as larceny. The general doctrine of what is a criminal intent has been explained under the head of criminal intent, and it needs but the application of that general doctrine to the facts of any particular case of alleged larceny, to determine whether the intent in that case is the intent necessary in larceny or not.

No taking is felonious where it is done under a bona fide claim of ownership, or right to possession, which is based upon a mistake of fact, however mistaken the claim; and there are many cases which go even further than this, and tend to support the proposition that no taking can be considered felonious which is done under a bona fide claim of ownership, or right, however mistaken, without regard to whether the mistake is a mistake of fact or a mistake of law.

There are also some cases which tend to support the doctrine that there can be no felonious taking unless it is done furtively or by stealth.[1] But it must

[1] McCourt vs. People, 64 N. Y., 583.

be said that these cases cannot be considered as in accord with sound principle.[2]

Larceny is one of the elements of the crime of robbery, a crime which cannot be committed otherwise than openly, and with the knowledge of its victim. Therefore, applying the general doctrine of criminal intent to the particular crime of larceny, it may be said that in this crime a criminal intent is found in the conscious purpose to deprive the owner of his property, where the accused has such a knowledge of the facts as, to a person acquainted with the law, will indicate that the act is larceny.[3]

There must be an intent to deprive the owner of his property permanently.

It has sometimes been supposed that there was no larceny unless the act was done lucri causa, that is, for the sake of profit to the wrongdoer. But there is no foundation for this notion. The intent to deprive the owner of his property permanently is all that the law demands in this respect.[4] And consequently it was decided that one who from malicious motives, backed the horse of another into a pit, by which the animal was killed, was guilty of larceny.[5]

But the deprivation intended must be a complete and absolute one. An intent to make a merely temporal use of the property, is not sufficient to make the

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[2] State vs. Fenn., 41 Conn., 590, and see note to this case, 1 Am. Cr., Rep. 393.

[3] Vaughan vs. Com., 10 Gratt., 758; Com. vs. Concannon, 5 Allen, 502; but see State vs. Deal, 64 N. C., 270.

[4] Vaughan vs. Com., 10 Gratt., 758; State vs. Slingerland, 19 Nev., 135; 7 Am. Cr., 338; Com. vs. Concannon, 5 Allen; but see State vs. Deal, 64 N. C., 270.

[5] Rex vs. Cabbage R. & R. C. C., 292.

temporary unlawful use larceny.[6] But in one case it was held that the driving away of a conveyance, and abandoning it in a place where the owner was not likely to recover it, was sufficient evidence to be submitted to a jury, as to whether or not the wrongdoer did intend to finally and absolutely deprive the owner of his property.[7] And to take property intending to hold it for reward, is larceny.[8]

In order that the intent to deprive the owner of his property permanently should amount to a felonious intent sufficient for the crime of larceny, it must be without color or bona fide claim of right, for a taking with intent to deprive the legal owner of his property, if under a bona fide claim of ownership, is not larceny.

A wrongful taking, however aggravated, if not accompanied with an intent to deprive the owner of his property does not constitute a larceny. This may be illustrated by different classes of cases. The wrongful taking of another's property for a temporary use, with the intent to return it after that particular purpose has been accomplished, is not a larceny. Thus, the taking of the horse of another, without his consent, to go to a certain place, and then return it, the courts have held did not amount to a larceny.[9]

So, where one takes the property of another under claim of right, even though such claim is without foundation, he does not commit larceny. Thus, in

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[6] Umphrey vs. State, 63 Ind., 223; 3 Am. Cr., 248.

[7] State vs. Davis, 38 N. J., 176; 1 Am. Cr., 398.

[8] Berry vs. State, 31 Ohio St., 2191; Com. vs. Mason, 105 Mass., 166.

[9] Schultz vs. State, 16 S. W. Rep., 756.

the case of People v. Hillhouse, 80 Mich., 580, where the defendant claimed that the taking of a horse was under a mortgage, the Court says: "There is a wide difference between a trespass, though wilful, and a larceny. The felonious intent is an essential and inseparable ingredient in every larceny, and if a person takes property under a claim of right, however unfounded, he has not committed larceny. * * * * Felonious intent must be manifested by acts, and consists in appropriating the personal property of another to his own use, or its destruction, without the owner's consent, and without the right or claim of right to do so, exercised or made in good faith.

"In a case where one, in good faith, takes another's property under a claim of right, or of title in himself, he is exempt from the charge of larceny, however puerile or mistaken the claim in fact may be."

So also the intent may be negatived by showing that the property was taken by mistake, or heedlessness. Thus one who unknowingly drives off the cattle of another, which have mingled with his herd, is not guilty of larceny.

THE TAKING.

By taking is meant the getting the property out of the possession or control of the owner, into the possession and control of the thief. No larceny can be committed unless this occurs, at least for some space of time, but this may be but for a moment.[10]

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[10] It is not necessary that the thing taken should come into the manual possession of the thief. One is guilty of larceny who procures an innocent person to steal property for him. See Lem. Doss vs. State, 21 Tex. App., 505.

And it has generally been stated by the text writers that this taking must be one which is a trespass, that is, against the will, or, without the consent, of the owner.[11] But the doctrine of trespass has to be explained and supplemented so much that it is practically of little value in explaining the crime of larceny. The better phrase would be to say that in larceny the unlawful taking into possession, which is a necessary element of the crime, must be, either a taking by an act of trespass or, when there is no trespass, it must be an obtaining of possession for the purpose of stealing. It is well settled that one who comes lawfully into the possession of personal property, not having at the time the intent to steal it, cannot be guilty of larceny whatever his subsequent intent and conduct, toward the property, and its owner. Under the general head of unlawfully obtaining possession are included trespass, that is the obtaining possession without the consent of the owner, obtaining possession by a fraudulent pretense or device, or, even obtaining a possession which would be lawful were there not a felonious intent to steal the property at the very moment the possession is obtained.

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[11] Obtaining and appropriating a man's money by fraudulent tricks with cards is larceny. People vs. Shaw, 57 Mich., 403; 6 Am. Cr., 403; Loomis vs. People, 67 N. Y., 322; 2 Am. Cr., 345. Where the owner, not being deceived by some fraudulent device, consents to the taking of the property, a conversion of it is no larceny. This was ruled in a case where, in order to entrap a thief the agent of the owner with the owner's consent delivered the property to one who came for the purpose of stealing it. See State vs. Coombs, 55 Me., 477; State vs. Lindenthall, 5 Rich. (S. C.), 237; Beatty vs. State, 61 Miss., 18; Snapp vs. Com., 82 Ky., 173; Watkins vs. State, 60 Miss., 323.

CONCURRENCE IN POINT OF TIME OF AN INTENT TO STEAL, WITH THE TAKING.

Every taking of possession of the property of another is larcenous, when an intent to steal concurs, in point of time, with the taking.

This proposition is illustrated in different classes of cases. It means, in every day speech, that no one can take into his possession the property of another, intending, at the very time he gets his hands on it to steal it, without incurring the guilt of larceny, although, if no such intent had concurred with the act, taking possession of the property would be a lawful act.

For instance, if a person to whom money is paid for which change should be returned receives it, intending at the time neither to return it, nor to give the proper change, he is guilty of larceny.[12]

So also if one is given too much change and, perceiving it at the time, carries it off, intending to steal it, he is guilty of larceny.[13]

Another class of cases is where a man, pretending that he intends to pay cash on delivery, gets possession of the property, and then refuses either to return the property or to pay for it. If the criminal intent exists at the time he gets the property into his possession he is guilty of larceny.[14]

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[12] Hildebrand vs. People, 56 N. Y., 394; Queen vs. Gamble, 2 Cr. Cas. Res., 1.

[13] Reg. vs. Middleton, 12 Cox Cr. Cas., 260; Fulcher vs. State, 32 Tex. Crim. App., 621; 9 Am. Cr., 734.

[14] Reg. Slowly, 12 Cox Cr. Cas., 269; Com. vs. Wilde, 5 Gray, 83; State vs. Hall, 76 Iowa, 85; 8 Am. Cr., 463. And it has been held that obtaining cigarettes from a "nickel-in-the-slot" machine by dropping in a brass counter is larceny. Reg. vs. Hands, 16 Cox C. C., 188; 8 Am. Cr., 469.

This principle is further illustrated in the next section where it is shown under what circumstances the finder of lost goods may be guilty of larceny by appropriating them to his own use.

The importance in every case of alleged larceny, of whether or not the original possession was lawful or unlawful is this: If the possession was originally obtained unlawfully, a felonious intent subsequently formed will make the act of depriving the owner of his property larceny, but if the original possession was a lawful one no subsequently formed felonious intent will make the conversion larceny. Take a common case. A person goes to the keeper of a livery stable and hires a conveyance. If at the time he obtains the property he intends to steal it his subsequent conversion of it will be larceny. If, on the other hand, he hires the property in good faith, intending to return it at the stipulated time, his subsequent conversion of it will not be larceny.[15] So in the case of lost goods. If they are found by a person who knows the owner, and the finder takes them into his possession intending at the time to steal them, his act is larceny;[16] and the rule is the same if the property is marked so that the finder upon looking at it knows who the owner is, or if he has reasonable ground to think the owner can be found.[17] But if the finder takes the property into his possession not knowing the owner and without, at that time, intending to keep it, at all events, his appropriation of it, by reason of a subsequently formed intention is not lar-

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[15] People vs. Smith, 23 Cal., 280; State vs. Stone, 68 Mo., 101; 3 Am. Cr., 277.

[16] Com. vs. Titus, 116 Mass., 42; and see note to this case on larceny of lost goods by the finder, 1 Am. Cr. Rep., 418.

[17] Baker vs. State, 29 Ohio St., 184; 2 Am. Cr., 337.

ceny,[18] although he may, at the time he forms this intent, have learned who is the owner.

If the possession was originally obtained unlawfully, a larcenous intent subsequently formed will make the act of depriving the owner of his property, larceny.

Mr. Bishop, while not stating this proposition clearly, yet illustrates it in the following manner. "Yet, ——— a fourth class of cases, ——— if one, in taking into his possession an article not his own, commits a technical trespass; or, a fortiori, if he commits a felonious one; an asportation of it afterwards is a renewal of the trespass, and when done with the intent to steal, it is larceny. Therefore, when a defendant, in driving away a flock of his own lambs from a field, drove with them inadvertently a lamb belonging to another person, and, as soon as he had discovered his mistake, sold the lamb for his own, and denied all knowledge of the fact, he was held to have committed this offense." [19]

The reason for this doctrine may be found in the principle that the owner of the property, never having legally lost his possession, still continues constructively in possession of his property; and the property, being constructively in his possession, any additional act of asportation, with intent to steal, is larceny. A strong illustration of this principle is found in that doctrine of the law of larceny, that where a thief carries stolen property from one county to another, or from one jurisdiction to another, there is a

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[18] Reg. vs. Matthews, 12 Cox C. C., 489; Starck vs. State, 63 Ind., 285; 3 Am. Cr., 250.

[19] Bish. Cr. Law, sec. 842; and see State vs. Coombs, 55 Me., 477; Com. vs. White, 11 Cush. (Mass.), 483; Reg. vs. Riley, 6 Cox C. C., 88.

fresh larceny in every new county, or in every new jurisdiction, in which he removes the property.[20]

There is a class of cases which, at first blush, would seem to be an exception to the doctrine of this section. They are cases where the owner of property consents to the taking of property, for the purpose of entrapping the thief. In such cases the would-be thief has the intent to steal at the very instant he gets possession, and yet he is not guilty of larceny.[21] This class of cases is referable to a principle which has been elsewhere explained, that, as matter of law no one can be guilty of larceny who takes and appropriates property with the consent of the owner, and in such a case the intent to steal cannot exist.[22]

There is another apparent exception to the rule as stated. Where there is a delivery by the owner to another, but yet no change of property or of the legal possession, larceny may be committed by a conversion of the property with felonious intent by the person to whom they are delivered by the owner, even though such felonious intent was not conceived until after such delivery.

This is a rule applying to the case of servants, and to persons to whom a delivery has been made of property for a special purpose.

Thus it is larceny for a servant to take goods of which he may have the mere custody, but which are nevertheless in the legal possession of the master.[23]

To constitute a larceny under such circumstances, the master must have the legal possession of the goods. A larceny differs from an embezzlement in

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[20] Ante, p. 67.

[21] Williams vs. State, 55 Ga., 391.

[22] Ante, p. 40.

[23] Com. vs. Berry, 99 Mass., 289; Marcus vs. State, 26 Ind., 101; Crocheron vs. State, 86 Ala., 64; 8 Am. Cr., 473.

this, that in an embezzlement the property converted must be in the possession of the person converting, and not in the possession of the owner, while in larceny the possession is in the owner.

It is sometimes difficult to determine whether certain acts charged constitute an embezzlement or a larceny.

DISTINCTION BETWEEN FALSE PRETENSES, AND LARCENY BY A TRICK.

In connection with the statement that obtaining possession by fraud is obtaining possession unlawfully, so as to involve the guilt of larceny, it is necessary to call the attention of the student to the distinction between what is sometimes called larceny by a trick, and the crime of obtaining property by false pretenses. If a person goes to the owner and falsely represents that he is sent by a third person for the property, in order to get possession of it and steal it, and he does convert it to his own use, he is guilty of larceny. In this case the owner does not intend to part with the title or ownership of the property to the person who thus obtains possession of it. But if a person goes to the owner and falsely represents that he is a man of wealth, and wishes to buy the article on credit, and it is sold to him on credit, he is guilty of the crime of obtaining property by false pretenses. The distinction turns upon the point of whether or not the owner intended to part simply with the possession, or with the title, to the person to whom he delivers the property.[24]

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[24] State vs. Anderson, 47 Iowa, 142; 2 Am. Cr., 100; Cline vs. State, 43 Tex., 494; Vickery vs. State, 19 Tex., 526; Stinson vs. People, 43 Ill., 397; Weyman vs. People, 4 Hun., N. Y., 511.

THE CARRYING AWAY.

The carrying away, or the asportation as it is usually called, is a highly technical term. It includes the slightest movement of the property from the position in which it is found by the thief.[25] Therefore, if a thief but lifts a thing which he intends to steal, if he puts his hand into the pocket of another and lifts out of its position [26] the property which he intends to steal, there is a sufficient asportation, and if he is caught before he can complete the act, he is guilty of larceny, and not merely of an attempt to commit larceny. But there must be some movement of the article: that is, of the whole of the article, from its position or no larceny is committed.[27]

Larceny can only be committed of personal property.[28]

In illustration of this proposition Blackstone humorously remarks that "no man, however feloniously disposed, ever stole an acre of ground." Things which belong to, and are part of, the realty are not the subjects of larceny. Fruit upon the trees, growing trees, grass, growing crops, buildings, and things of like nature, are regarded as parts of the realty.[29] So long as they are part of the realty, they are not subjects of larceny. But here an observation must be made. If the act of severing a part of the realty and carrying it off is continuous and by the same party, it is at common law a trespass, and not a larceny. But when a thing which is part of the

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[25] Price vs. State, 41 Tex., 215; State vs. Green, 81 N. C., 560.

[26] Flynn vs. State, 42 Tex., 301; Harrison vs. People, 50 N. Y., 518.

[27] Eckels vs. State, 20 Ohio St., 375; Com. vs. Luckis, 99 Mass., 431.

[28] Water in pipes, the property of a water company, may be the subject of larceny. Feoms vs. O'Brien, 4 Am. Cr. 611.

[29] Holly vs. State, 54 Ala., 238.

realty is severed from the realty, it becomes personal property, and, if abandoned for a sufficient length of time by the person who severed it, comes constructively into the possession of the owner, and he who then takes it away for the purpose of stealing it is guilty of larceny.[30] The legislatures of most of the States have supplemented this defect in the common law by statutes against criminal or malicious trespass to real estate.

ANIMALS AS SUBJECTS OF LARCENY.

Not everything of a personal nature which is the subject of ownership, and for the conversion of which a civil action will lie, is a subject of larceny at the common law. This is especially true with regard to animals. Animals not domesticated are not regarded as the subjects of larceny. And even some domestic animals, as the dog,[31] the cat, singing birds, and the like, which are not considered to have an intrinsic value for food, or as articles of merchandise, are not by the common law regarded as subjects of larceny. But this idea is gradually giving way, and is being corrected in some States by decisions of the courts and in other States by legislative enactment.[32]

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[30] State vs. Hall, 5 Harr. (Del.), 492; People vs. Williams, 35 Cal., 671; State vs. Berryman, 8 Nev., 262.

[31] State vs. Lymus, 28 Ohio St., 400.

[32] In a general way it may be said that all animals which have an intrinsic value as articles of food, or otherwise, were regarded at the common law as subjects of larceny when reduced to possession. An elaborate and interesting discussion of the matter involved in this subdivision will be found in 2 Bish. Cr. Law, sections 786 to 791 inclusive. The following have been held subjects of larceny: Mocking bird in a cage, Haywood vs. State, 41 Ark., 429; doves in a dovecote, Com. vs. Chace, 9 Pick. (Mass.), 15; rabbits, Reg. vs. Petch, 14 Cox Cr. Cas., 116; peafowl, Com. vs. Beaman, 8 Gray (Mass.), 497; dogs which are taxed, Mullaly vs. People, 86 N. Y., 365.

CHOSES IN ACTION AS SUBJECTS OF LARCENY.

At the common law the words property, goods and chattels, imported something of an intrinsic value, and hence these words did not include a chose in action. For instance, the larceny of a promissory note, payable to bearer for five hundred dollars, could not be charged as the larceny of property of the value of five hundred dollars, although, in the hands of a bona-fide holder for value, it might be worth five hundred dollars, and the owner might be deprived of that value by its loss.[33] This defect in the common law has largely, if not completely, been cured by legislative enactments of the different States.

Larceny can only be committed of the property of another.

If a man is sole or a part owner, and entitled to possession of the property which he is charged with stealing, he cannot be guilty of larceny. Neither, at the common law, can a man be guilty of stealing the property of his wife, nor a wife of stealing the property of her husband.[34] But, although it is generally true that a man cannot be guilty of stealing his own property, the proposition is subject to some modification. A man may be guilty of stealing his own property if he takes it surreptitiously from the possession of another, with the intent that this latter shall be charged with, or held for its value.[35] Whether, if he takes it secretly from a bailee who has a lien upon it with the purpose of depriving the bailee of his lien, he is guilty of larceny, may be

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[33] People vs. Payne, 6 Johns. (N. Y.), 103; Reg. vs. Watts, 6 Cox C. C., 304.

[34] Queen vs. Kenny, 2 Q. B. Div., 307.

[35] Adams vs. State, 45 N. J. Law, 448; 4 Am. Cr., 331; Palmer vs. People, 10 Wend. (N. Y.), 166.

a question of more difficulty, but keeping in mind the fact that the lien of the bailee is a mere chose in action, and also the common law doctrine that a chose in action is not the subject of larceny, it would seem that such an act would not be larceny at the common law. It is also the law that it is not necessary that the one from whom the goods are taken should have more than a bare possession of the goods which are stolen. Therefore, one may be guilty of larceny in stealing stolen goods from the possession of the thief,[36] or from any bailee, or from one who is a bare custodian. As it is said in the civil courts bare possession is sufficient to support an action of trespass against one who cannot show a better title, so, in the law of larceny, bare possession, however unlawfully obtained, is sufficient to support a charge of larceny against the thief. The man who steals is not permitted to say that he is not guilty of larceny because the man from whom he stole did not have a valid title to the property.[37]

The term owner is used in the definition not necessarily in its common acceptation as indicating the possessor of title to the property, for in some cases it may be construed rather as indicating a special ownership, or right of possession, as against the person taking the property.

We may summarize the discussion of the law of larceny up to this point in the following propositions:

1st. Where the possession of personal property of another is obtained lawfully without any fraudulent intention, a subsequent conversion of the same with a felonious intent is not larceny.

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[36] Ward vs. People, 3 Hill (N. Y.), 395.

[37] Com. vs. O'Brien, 12 Allen (Mass.), 183; People vs. Stone, 16 Cal., 369; People vs. Long, 50 Mich., 249.

2nd. Where the possession of personal property of another is unlawfully obtained; that is, either (a) by an act of trespass, (b) by the consent of the owner obtained by a fraudulent pretense or device, with a felonious intent: (c) with the intent to steal it existing at the moment that the possession is obtained, a subsequent conversion of the property with a felonious intent constitutes a larceny.

3rd. Where the owner of personal property parts with the possession and title of personal property, there cannot be a larceny, even though the delivery of the property is obtained by false representations.

4th. Where personal property is in the mere custody of one while the legal possession remains in the owner, a conversion of it with felonious intent by the person having such custody, is a larceny.

EMBEZZLEMENT.

Embezzlement consists in the felonious appropriation of the property of another, lawfully received into possession, by one who occupies a position of trust or confidence toward the owner, by virtue of which trust or confidence,[37] he comes into possession of the thing embezzled.[38]

Embezzlement is a kind of statutory larceny. There was no such crime at the common law, and

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[37] Unless there is confidence reposed there can be no embezzlement, and therefore it is not embezzlement to fraudulently appropriate money paid by mistake (Com. vs. Hays, 14 Gray, 62), although this may be larceny.

[38] In an action for slander in charging a postmaster with embezzling letters, the court used this language: "Johnson and Walker define the word embezzle to mean, 'to appropriate by breach of trust;' and Webster defines it, 'to appropriate fraudulently to one's own use what is entrusted to one's care and management.' It differs from stealing and robbery in this, that the latter imply a wrongful taking of another's goods, but embezzlement denotes the wrongful appropriation and use of what came into possession rightfully." Taylor vs. Kneeland, 1 Doug. (Mich.), 67.

the original statute against embezzlement was passed to remedy a defect in the law of larceny. It was, and is an essential element of the law of larceny that the thief should have come into the possession of the property unlawfully, or as the old writers phrased it, by a trespass.[39] And, therefore, one who comes lawfully into possession of the personal property of another, commits no larceny by appropriating it to his use, although he has no excuse whatever for the appropriation. For this reason clerks, servants, and agents, into whose possession property of their masters or employers came lawfully, in the course of their employment, were not guilty of larceny in appropriating their master's property. To cure this defect the original statute against embezzlement was passed. It is generally found on the statute books in substantially this form:

"If any officer, agent, clerk or servant of any incorporated company, or if any clerk, agent, or servant of any private person, or of a copartnership, except apprentices and other persons under the age of sixteen years, shall embezzle, or fraudulently convert to his own use, or shall take or secrete, with intent to embezzle and convert to his own use, without consent of his employer or master, any money or property of another, which shall come to his possession, or shall be under his care, by virtue of such employment, he shall be deemed, by so doing, to have committed the crime of larceny." [40]

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[39] What is obtaining possession unlawfully within the law of larceny is fully explained in the discussion of the law of larceny.

[40] The court says, in Com. vs. Hayes, 80 Mass. (14 Gray), 63, that "The statutes relating to embezzlement, both in this country and in England, had their origin in a design to supply a defect which was found to exist in the criminal law. By reason of nice and subtle distinctions, which the

Besides this statute, many other statutes have been passed to reach persons who are not included within the terms of this statute, who shall feloniously appropriate property which comes lawfully into their possession in a fiduciary capacity. But all of these statutes have the same general characteristics, and are governed in their application by the same general principles as the statute which has been quoted, and it will therefore be unnecessary to examine them in detail. It will be sufficient for the purposes of this work to inquire into the general principles which pervade the law of embezzlement, as it exists to-day, and this may be done most conveniently by taking for a text the statute which we have quoted. Embezzlement is a kind of stealing, or, as said before, a species of larceny, but as all kinds of stealing were not at the common law larceny, neither have all the kinds of stealing which prevail in the world as yet been brought into the domain of the criminal law by virtue of the statutes against embezzlement. It is necessary, therefore, to enquire what kinds of stealing are criminally punishable as embezzlements. From what has been said here, and what is said in the discussion of the law of larceny, the student will have anticipated this proposition.

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courts of law had recognized and sanctioned, it was difficult to reach and punish the fraudulent taking and appropriation of money and chattels by persons exercising certain trades and occupations, by virtue of which they held a relation of confidence or trust toward their employers or principals, and thereby became possessed of their property. * * * The statutes relating to embezzlement were intended to embrace this class of offences; and it may be said generally, that they do not apply to cases where the element of a breach of trust or confidence, and the fraudulent conversion of money or chattels, is not shown to exist."

Embezzlement can only be committed by one who, (1) has come lawfully into possession, and (2) who is under a legal obligation to the owner as to the property embezzled, or, in other words, who in appropriating the property, is guilty of a breach of trust.

The felonious appropriation of the property of another, or in common language, stealing, is the essence of the crime of embezzlement, as it is also of the crime of larceny. It has been often said that breach of trust is the gist of embezzlement. But by this phrase is to be understood that breach of trust is the distinguishing characteristic of this kind of stealing; that is, unless there is a breach of trust, or, in more familiar language, a betrayal of a confidence reposed by the owner of the property in the one who fraudulently appropriates it, there is no embezzlement. What is a felonious or fraudulent appropriation, or conversion to one's own use, is explained in the discussion of the law of larceny,[41] and there is no occasion to repeat here what is there said, since in this respect there is no difference in the law of larceny and the law of embezzlement. But owing to the difference in the circumstances under which the two crimes are committed, there is one point to which it is especially necessary to call the student's attention in connection with the law of embezzlement.

One who converts to his own use the money or property of his employer, intending to replace it, is as much guilty of embezzlement as though he had no such intention.

The animus furandi, as it is called, which will be best understood if we call it, as it should be literally translated, the intention to steal, or perhaps better,

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[41] Ante, under title Larceny.

the intention to defraud the owner of his property, is a common essential element of the crimes of larceny, embezzlement, and obtaining property by false pretenses. And there has been some confusion among the authorities as to what this intent is. It is agreed upon all hands that an intent to make merely a temporary use of the property of another, and then return it to the owner, or restore to its place without injury to it, is not such a criminal intent. But it is equally clear that an intent to make such a use of it as will permanently deprive the owner of the thing itself is such a criminal intent, and that an intent at some subsequent time, from some other resources, to replace the money or thing appropriated does not purge this intent from its criminality. A privately entertained good intention is not an equivalent for property in the law.[42]

Leaving with this the question of what is a felonious conversion in embezzlement, we proceed to enquire first, as to the relation which a person must occupy to the owner of the property, in order to be guilty of the crime of embezzlement by converting it to his own use. That it is necessary to make such an enquiry marks one of the fundamental differences between embezzlement and larceny. Whether any relation exists between the parties is of no importance in larceny, with the single exception of the mutual relation of husband and wife. In embezzlement the first element is the existence of a contract relation, which, so far as the law of embezzlement is concerned, may be defined as a contract on the part of the person in possession to the owner of the property,

[42] Robson vs. State, 83 Ga., 166; State vs. Leicham, 41 Wis., 565; 2 Am. Cr., 117; People vs. De Law, 80 Cal., 52; State vs. Pratt, 98 Mo., 482; State vs. Trolson, 21 Nev., 419; 9 Am. Cr., 243. This last case is an unusually full discussion of the principle now under discussion.

with respect to this very property, to deal with it in a certain way for the benefit of, or as directed by, the owner.

In the general statute which has been quoted the words which mark the relation are these. "Any officer, agent, clerk, or servant * * * his employer or master * * *"

By turning back the student will find the whole statute from which these words are quoted. The rest of the statute is of no importance to the purpose now in hand, because this is all there is in the statute which bears upon the question now under investigation, and all of these words do bear upon it. We have had occasion elsewhere to call the attention of the student to certain rules by which criminal statutes are interpreted. The original statute against embezzlement has been more interpreted, and more correctly interpreted, that is, more nearly in accordance with the fundamental principles which pervade our common law, than any other ancient criminal statute, and therefore, as the law of embezzlement unfolds itself, it reveals also certain great principles governing the interpretation of statutes which the student should strive to master. In interpreting any statute, or any part of a statute, all the words which have any relation to the point under consideration must be construed together. In this case, the words officer, agent, clerk, and servant, are limited in their meaning by the words employer and master. And therefore it is settled that not every officer or agent comes within the terms of this statute, but only such as have employers or masters in the ordinary sense of these words.[43]

[43] But see contra State vs. Foster, 1 Am. Cr., 146. In People vs. Treadwell, 69 Cal., 226; 7 Am. Cr., 152, it was held that an attorney employed to collect a note was an agent within the meaning of the statute against embezzlement.

A carrier whose duty it was to receive and pay over money, deducting his own charges, was held not to be within the statute because the relation of master and servant did not exist.[44]

A constable, employed to make collections, was held not to be within the statute for the same reason.[45] A broker or commission merchant, who has authority by the usual custom of business to mingle the moneys of his principal with his own, is not an agent within the terms of this statute. Otherwise if he has no such authority, but is bound to pay over the specific proceeds to his employer, or to a named person.

These cases illustrate a feature of the law of embezzlement which must not be lost sight of. We have seen that in every embezzlement there is breach of a trust, growing out of a contract relation. But every breach of contract is not, in the legal sense, a breach of trust. The breach of contract which is a breach of trust, within the terms of the law of embezzlement, is the breach of a contract to deal with the property of another in a specific way, and to turn over and deliver this identical property, or its specific proceeds, to the owner, or to the person designated by him. Therefore where the contract is of such a nature that by the receipt of the money or property, the relation of debtor and creditor is created there can be no embezzlement.[46]

The property embezzled, must be something lawfully received, in the course of the employment.

It was formerly supposed in England that property delivered by the master to the servant was not prop-

[44] Reg. vs. Gibbs, Dears, 445; People vs. Allen, 5 Denio, 76.
[45] Com. vs. Foster, 107 Mass., 221; Com. vs. Stearns, 2 Metc., 343.
[46] People vs. Wadsworth, 63 Mich., 500.

erty which came to his possession by virtue of his employment. But this is not the law in the United States. In most of the States it makes no difference, whether the property is delivered to the servant by the master, or to the servant by a third person for the master.[47] But in this latter case it must be something which the servant had a right to receive for the master, by virtue of his employment, as for instance, money which a salesman receives on the sale of goods. For if the servant received for the master something which his employment did not authorize him to receive, he is not guilty of embezzlement in converting it to his own use.[48] Therefore, if a salesman, who has no authority to purchase goods, were to receive goods from a traveling salesman, as on a purchase for his employer, and convert them to his own use he would not be guilty of embezzlement. A breach of a trust reposed by the employer or principal is an essential element of the crime of embezzlement, and where no trust is reposed there is no embezzlement.

The act of embezzlement can only be committed while the property is in the possession of the agent or servant, by virtue of the trust reposed.

This proposition marks one of the essential differences between embezzlement and larceny. While, as

[47] Lowenthal vs. The State, 32 Ala., 589; People vs. Hennessey, 15 Wend., 147; People vs. Dalton, 15 Wend., 581. But see Com. vs. Berry, 99 Mass., 428; Com. vs. Davis, 104 Mass., 548, in which it was held that if the property was delivered to the servant by the master the offense was larceny.

[48] When a clerk, without authority, collected money due his master, it was held that he was not guilty of embezzlement in appropriating it to his own use. Brally vs. State, 21 Tex. App., 659. The same principle is illustrated in Reg. vs. Harris, 6 Cox. C. C., 363, and Reg. vs. Cullom, L. R., 2 Crown Cas., 28; State vs. Johnson, 49 Iowa, 141; 3 Am. Cr., 62.

has been explained, the essence of the wrong (i. e., the felonious conversion or appropriation of the property of another) is the same in these two crimes, yet they are never to be confounded. These two crimes touch elbows, but they never overlap.[49] Nothing which is larceny is embezzlement, nor is any embezzlement a larceny.[50] In larceny, the first element of the crime is a trespass against a lawful possession; in embezzlement the first element is an abuse of the trust by virtue of which the wrong-doer has possession. Therefore, if the trust under which possession was had is once fulfilled, and the possession is transferred to the master, or to the person entitled to it, a subsequent appropriation may be larceny, but it cannot be embezzlement. The object of the trust being

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[49] The student will understand that embezzlement, being a statutory offense, the law in the different states varies. The discussion of the crime has not admitted of a reference to all the statutes, and has been only of a general nature as to those elements which are more or less common to all the statutes.

It is in the power of any of the legislatures to make the offense include acts which are larceny at common law.

See Planters' Ins. Co. vs. Tunstall, 72 Ala., 142; People vs. Salorose, 62 Cal., 139; Ker vs. People, 110 Ill., 630.

But anything which is indictable under the common law as larceny ought not to be punishable under the statute as embezzlement.

Fulton vs. State, 13 Ark., 168; Kribs vs. People, 81 Ill., 599; Com. vs. Berry, 99 Mass., 428; Lowenthal vs. State, 32 Ala., 589.

The student is advised to consult the statutes and decisions of his own state.

[50] Kribs vs. People, 81 Ill., 599; 2 Am. Cr., 114. A clerk or servant can as well be guilty of larceny of his master's goods as a stranger. If a bank teller takes the funds of the bank after business hours he is guilty of larceny, because, at this time, he is not entrusted with their possession, and so with regard to a salesman who goes to the store and takes away goods after closing time. Com. vs. Barry, 116 Mass.; Com. vs. Davis, 104 Mass., 548.

accomplished, the person in whom the trust was reposed stands, as to the property involved, in the same situation as though he had never had possession. While the principle is clear very nice questions sometimes arise upon this point, as to whether the act charged is larceny or embezzlement. In a recent case it appeared that the respondent, a clerk receiving money on a sale made by him in his employer's store, dropped the money into the money-drawer of a cash-register, the drawer being open at the time. He did not register the sale, and, within a minute or two, took the money from the drawer and put it into his pocket. And the question was whether this was larceny or embezzlement. It was held that the act was embezzlement, the prisoner never really having parted with the possession of the money. The case is a very interesting one, and is a very critical discussion of the difference between larceny and embezzlement in the feature now under consideration.[51]

CUSTODY AND POSSESSION.

A servant who appropriates property of which he has merely the custody, is guilty of larceny; if he has the possession, he is guilty of embezzlement.

This is a distinction which has been recognized in many cases. It is difficult to lay down any clear principle by which it may be always determined, when the servant has possession, and when he has a bare custody. It may be said, however, that when a thing is constructively in the master's possession, the servant can have no more than a bare custody. But until the thing has been actually or constructively in the master's possession, the servant who fraudulently

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[51] Com. vs. Ryan, 155 Mass., 523.

appropriates it to his own use is guilty of embezzlement. The distinction will probably be most readily apprehended by a reference to cases which have turned upon this point. The case last cited [52] is one of those which illustrates the principle now under consideration. If, in that case, the clerk had closed the drawer and registered the sale, the master would have come into constructive possession of the money, and a felonious appropriation of it, by the clerk, would have been larceny and not embezzlement. A servant who having charge of a mule to do farm work with, took it off and sold it was held guilty of larceny.[53] And there are a number of cases which hold that where a property is delivered by the master to the servant a fraudulent misappropriation is always larceny, and not embezzlement.[54]

FALSE PRETENSES.

The crime of obtaining money by false pretenses is committed when one knowingly makes a material false pretense to another, for the purpose of, and by means of which, he obtains his property, with intent to defraud him of it.

The crime of obtaining property by false pretenses is a statutory, and not a common law, offense. Every State has a statute, or statutes, of its own, but they are similar in certain essential qualities, and are to be interpreted by the same general legal principles.

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[52] Com. vs. Ryan, supra cit.

[53] Crocheron vs. State, 86 Ala., 64; see also State vs. Schivgen, 20 Wis., 74.

[54] Com. vs. Berry, 99 Mass., 428; Rex vs. Murray, 5 C. & P., 145.

To obtain the property of another, within the meaning of the Statutes against false pretenses, is to obtain the title, or ownership of the property, and not merely its possession.[55]

In discussing the law of larceny, attention has been called to the difference between the crime of obtaining property by false pretenses and what is known as larceny by a trick.[56] Where, by means of false pretenses, one obtains possession of the property of another, the owner not intending to part with the title, but merely to intrust the wrongdoer with possession, if the wrongdoer then steals the property, he is not guilty of obtaining property by false pretenses. To constitute the latter crime, it is essential that the owner should intend to part with the title of his property, and that the wrongdoer should become the owner of the property through, or by means of, the fraud practiced upon the owner. So long as the owner of the property remains its legal owner he cannot be said to have been defrauded of it by false pretenses.

OF THE NATURE OF THE PROPERTY WHICH MAY BE THE SUBJECT OF THIS CRIME.

The original statute against obtaining property by false pretenses included only goods, wares and merchandise; but the original statute has been enlarged, and many additional statutes have been passed, so that under the statutes of most, if not all, the States, any kind of property may be the subject of this crime. They cover not only tangible property, such as goods, chattels, money and the like, but also

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[55] Where the title does not pass the crime of obtaining property by false pretenses is not committed. State vs. Anderson, 47 Iowa, 142; 2 Am. Cr., 100.

[56] Ante, under title Larceny.

choses in action, such as stocks, bonds, mortgages, promissory notes, and the like, and the statutes of many States are extensive enough to cover the case of obtaining the signature of another, to any instrument involving a legal liability by means of false pretenses; that is, to any instrument which might be the subject of forgery; that is, any instrument, the signing of which would, or might, subject the maker, endorser, guarantor, or surety, to a legal liability or obligation. Upon this branch of this subject the statutes of any particular State must be consulted, when the question under them arises, as to whether or not the crime of defrauding another by means of false pretenses has been committed.

A false pretense within the statute is essentially a false statement or representation to another, as to an existing fact.

For instance, if one offers to sell an article to another, and, in order to induce him to buy the article and pay his money for it, he makes a false statement of matter of fact, as to something which is material to the value of that which he has to sell, this is a false pretense within the meaning of the statute. Thus, it is false pretense to allege that a horse, which is offered for sale, is sound, when the seller knows that it is not sound.[57]

And so it is a false pretense, within the meaning of the statutes, for a person, desiring to purchase goods on credit, to falsely represent the facts which are material to his credit. Where a person represented himself to be doing a successful business as a merchant in Boston, and that he was worth between $9,000 and $10,000 over and above all his debts,

[57] State vs. Stanley, 64 Me., 156; 1 Am. Cr., 209; State vs. Wilkerson, 103 N. C., 337.

whereas, in fact, he was at the time wholly insolvent, this was held to be false pretense within the meaning of the statute.[58]

And if a person, for the purpose of obtaining credit, falsely represents himself to be an officer in the army, or to hold some other position which might entitle him to credit, this is also a false pretense within the statute.

It is not necessary that the falsehood should be directly asserted.

It may be implied from the language or conduct of the party. Thus, when one went to a shopkeeper for the purpose of getting credit, wearing the cap and gown of a university student, whereas, in fact, he did not belong to the university, it was held that this amounted to a false pretense that he was a university student, although he said nothing about it.[59] And in another prosecution for obtaining property by false pretenses, the indictment charged that the prisoner falsely pretended that he was a dealer in potatoes, and in a position to do a good trade, and was able to pay for large quantities of potatoes, and that these pretenses were false. To maintain the prosecution the following letter was given in evidence:

"Sheffield, January 17, 1876.

Dear Sir — Please send me one truck of regents and one of rocks, as samples, at your price named in your letter; let them be good quality, then I am sure a good trade will be done for both of us.

I will remit you the cash on arrival of goods and invoice.

Yours truly,
WM. COOPER.

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[58] People vs. Haynes, 22 Wend., 565.
[59] Rex vs. Barnard, 7 C. & P., 784.

P.S. — I may say, if you use me well, I shall be a good customer. An answer will oblige, saying when they are put on."

In fact, the purchaser was a small huckster, not in the habit of dealing in potatoes, and did not intend to pay for these, but when they arrived he sold them at what he could get for them, and absconded. And it was held that he was guilty of obtaining property by the false pretenses alleged in the indictment.[60]

The false pretense must be a representation as to an existing fact.

In the words "existing fact" we find matter for discussing two other principles belonging to the law of obtaining property by false pretenses. The use of the word existing is intended to distinguish between a false pretense as to that which already subsists, and a false pretense as to that which the wrongdoer intends to do in the future.

It is a fundamental doctrine of the law of false pretense that a false promise, that is a promise which is not intended to be kept, is not a false pretense within the meaning of the statute.[61] Thus a false pretense made by a man to a woman that he intended to marry her on a certain day, by means of which he got possession of her money, which he said he was going to use to buy his wedding suit and furniture, and when he had got possession of the money he went off with it, was held not to be a false pretense within the meaning of the statute, although the pretense that he intended to marry the woman was made solely for the purpose of cheating her out of her money.[62]

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[60] Queen vs. Cooper, 2 Qu. B. Div., 510; 3 Am. Cr., 458.
[61] Com. vs. Moore, 99 Pa. St., 570; 4 Am. Cr., 230.
[62] Reg. vs. Johnson, 2 Moody, 254.

And in New York it was held that inducing a person to pay money for a situation which was not intended to be given him, was not a false pretense within the statutes because it was promissory in its nature.[63]

The word "fact," in the statement that the false pretense must be as to an existing fact, is used in contradistinction to the word opinion. An assertion as to that which is purely matter of opinion, however falsely made, will not expose the person making it to the penalties of the law of obtaining property by false pretenses.

Thus, statements as to the value of lots, or that they were "nicely located" are matters of opinion and not of fact, and therefore are not within the statute.[64]

And generally speaking, although, perhaps not invariably, a representation as to value will be considered matter of opinion, and not matter of fact. It was held that a false representation as to the value of a business will not sustain an indictment for obtaining money by false pretenses.[65]

The pretense must be false in fact, and it must have been known, or believed, by the accused that it was false in fact.

No one is guilty of this crime by representing a thing to be true if he, himself, believes it to be true, however baseless his belief may be. And, on the other hand, no man is guilty of this crime by assert-

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[63] Ranney vs. People, 22 N. Y., 413. But Ranney vs. People is criticized in People vs. Winslow, 39 Mich., 505.

[64] People vs. Jacobs, 35 Mich., 36; 2 Am. Cr., 102.

[65] R. vs. Williamson, 11 Cox. C. C., 328; but it has been held, that a representation that a bank is solvent is matter of fact, and not matter of opinion. Com. vs. Wallace, 114 Pa. St., 405; 7 Am. Cr., 179.

ing what he believes to be false if, in fact, what he asserts is true, even if it is his own intendedly false assertion that makes the thing true. In one case a man fraudulently represented that a certain crop was not covered by a mortgage, believing at the time that it was. It turned out, however, that although there was a mortgage which was intended to cover the crop, it did not really cover it, because of a defective description, and the case was held not to come within the statute.[66]

In another case the holder of a first mortgage induced the holder of a second mortgage to represent the second mortgage to be a first mortgage, and by this means induced the prosecutor to give him the money for it. Upon the trial of the case it was held that the holder of the first mortgage, being privy to the fraud, was thereby estopped from asserting that his mortgage was a first mortgage, upon the principle that wherever one induces another to act upon his representation, he will not be permitted afterwards to say that his representation was false, to the prejudice of one to whom he made the representation, and who acted upon the faith of it. Therefore, because the holder of the first mortgage was a party to the fraud, his mortgage would be held to be subsequent to the mortgage which he had caused to be represented to be the first. Therefore, by his own conduct, he had made the second mortgage to be the first, and this relieved the second mortgagee from the guilt of obtaining money by false pretenses, although his purpose and conduct were such as to make him liable to the penalties of the statute.[67]

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[66] State vs. Garris, 98 N. C., 733.

[67] State vs. Asher, 50 Arkansas, 427.

This case offers a further and striking illustration of the principles by which criminal statutes are construed. As we have said elsewhere, they are construed with the utmost strictness. An act charged as a crime must be both within the letter and the spirit of the statute, and if, by the application of any legal principle, it can be found to be outside of the limits of the statute, it is not punishable as a crime. In this case the student will observe that merely by the operation of an equitable principle, with which the intending criminal was not familiar, he was prevented from committing the crime which he meditated, and for the purpose of committing which, he was guilty of all the acts which would have made him criminally liable, had it not been for the operation of this principle which he did not take into consideration.

The false pretense must be a material false pretense, that is, it must be one on which the party defrauded relied, as an inducement to part with his property.

In the principle above stated the word "material" is used in sense of effectual, that is, it must have been the means by which the fraud was accomplished. From this it follows naturally that unless the person who parts with his property believes the false pretense to be true, the crime of obtaining property by false pretenses is not committed. In this respect there is an analogy between the law of false pretenses and the law of larceny. There are many cases which hold that the crime has not been committed because the owner of the property consented to the taking of goods in order to trap the thief or for some other purpose. In such cases it is held that no larceny has been committed because there is no taking

against the will and consent of the owner. So, in the law of false pretenses the crime is not committed unless the person alleged to have been defrauded is actually deceived, and by means of the deceit practiced upon him is induced to part with his property.

We have said before that a mere false promise, that is, a promise, which, at the time it was made, was not intended to be kept is not a false pretense within the meaning of the statute, but, on the other hand, when the false promise is coupled with a false pretense as to an existing fact, without which the promise would not have been relied upon, the false

It is not necessary that the false pretense should have been the sole inducement to part with the property; it is enough that it was an inducement to such an extent, that without it, the fraud would not have been successful.[68]

pretense as to such existing fact is within the statute, although, without the promise, it would have been no inducement to part with money or property. Therefore, where the pretense used was that the prisoner was unmarried, which was false, and it was coupled with a promise to marry, and by this means money was obtained, the pretense of being unmarried was held to be within the statute, although the pretense of being unmarried, without the promise, would have been no inducement to the party defrauded to part with her money.[69]

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[68] Smith vs. State, 55 Miss., 513; 3 Am. Cr., 92; re Snyder, 17 Kan., 542; 2 Am. Cr., 228.

[69] Reg. vs. Jennison, 9 Cox. Cr. Cas., 158; People vs. Winslow, 39 Mich., 505.

A false pretense is not a material false pretense within the statute, unless there is some rational and logical connection between the pretense and the effect which it is alleged to have produced.

Or, in other words, it must be such a pretense as that it might naturally, or reasonably, have induced the party to part with his property in reliance upon it. While this principle is clearly apparent in many of the decisions in cases arising under the statute against false pretenses, it must be confessed that it is difficult to state its exact limitations. There are many cases holding that an alleged false pretense is not within the statute, because in its nature it did not afford inducement to the party to part with his property.

These cases rest upon a principle which so far has not been shaken. There are also many cases in which it has been held that a false pretense was not within the statute because it was not calculated to impose upon people of ordinary intelligence. In one case it was held that a false statement that a house and lot were unincumbered was not a false pretense within the statute, because the party defrauded might easily have examined the public records, which would have shown him that the property was subject to a mortgage.[70] In another case the false statement that cotton sold was good "middling" was held not to be within the statute, because the purchaser might have examined the cotton himself.[71] But the great weight of modern authority is against the doctrine of these cases, and the prevailing doctrine now is, that a person has a right to rely upon statements made to him without personally investigating

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[70] Com. vs. Grady, 13 Bush. (Ky.), 285.
[71] State vs. Young, 76 N. C., 258.

their truth or falsehood, and that it does not lie in the mouth of the wrongdoer to assert that a person ought not to have been deceived by a lie, told for the very purpose of deceiving him.[72]

The crime of obtaining money by false pretense is not complete unless it is done with an intent to defraud the owner of his property.

In conformity with this proposition it is settled that a creditor who, by false pretenses, induces a debtor to pay a sum of money which he actually owes, is not guilty of any crime,[73] but if by means of false pretenses the creditor obtains a greater sum than is actually due, he may be convicted of obtaining the excess by means of false pretenses.[74]

It is also held that one who obtains the property of another, by means of false pretense, with intent to make a merely temporary use of it, is not guilty of the crime, because he has no intention permanently to deprive the owner of his property.[75] This is the same principle which is applied in the law of larceny. But this must not be confused with a case in which one obtains money under false pretenses, with an intention of afterwards paying the money back. Such an intention is an intention to defraud within the strict meaning of the statute, even though the party who has obtained money under such circumstances has ample means to make restitution.[76]

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[72] State vs. Fooks, 65 Iowa, 196; re Greenough, 31 Vt., 279; Thomas vs. People, 113 Ill., 531.

[73] Com. vs. McDuffy, 126 Mass., 467.

[74] State vs. Hurst, 11 W. Va., 54; 3 Am. Cr., 100.

[75] Reg. vs. Kilham, 11 Cox. C. C., 561.

[76] Com. vs. Coe, 115 Mass., 481; State vs. Thatcher, 35 N. J. L., 445.

CHARITY.

It has been disputed whether or not money obtained by false pretenses as a charitable gift comes within the statute. In New York it has been held that if a donation has been given out of charity, the person obtaining it is not indictable, although it was obtained by means of false pretenses.[77]

But the weight of authority is clearly the other way, and justly so. As was stated by the Supreme Court of Massachusetts, "there is as much reason for protecting persons who part with their money from motive of benevolence as those who part with it from motive of self-interest. The law favors charity as well as trade and should protect the one as well as the other from imposture by means of false pretenses." [78]

Since the decision in New York, a statute has been passed in that State, expressly punishing the obtaining of property by false pretenses "for any alleged or pretended charitable or benevolent purpose."

But this statute, it will be observed, does not punish the obtaining of money by false pretenses for a really charitable and benevolent purpose, and consequently, does not go to the length which the Supreme Court of Michigan did in a recent decision.[79]

There is still one more important difference between the decisions of the courts on the law of false pretenses.

It is held in some of the States that where the person from whom the money is obtained parts with it for an illegal and criminal purpose, the one who obtains it by means of false pretenses is not subject to

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[77] People vs. Clough, 17 Wend. N. Y., 35.
[78] Com. vs. Whitcomb, 107 Mass., 488.
[79] People vs. Lennox, decided Oct. 1, 1895.

punishment under this statute. In one case the person gave money to one who falsely pretended to be an officer, and to have a warrant for his arrest, to induce the pretending officer not to arrest him.[80]

And in another case, money was paid by the prosecuting witness to obtain possession of boxes falsely represented to contain counterfeit money.[81]

In both of these cases it was held that the acts complained of did not come within the statute, upon the ground that the statute is intended for the protection of honest people, and not to protect rogues in their dealings with one another. In other States a different doctrine has been held.[82]

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[80] McCord vs. People, 45 N. Y., 470.

[81] State vs. Crow., 41 Wis., 271.

[82] People vs. State, 67 Ind., 270; Com. vs. Morrill, 62 Mass., 18; Cush., 571; People vs. Henssler, 48 Mich., 49. And upon the general question see ante under title Concurring Guilt.

FORGERY.

CHAPTER VII.

FORGERY — UTTERING — ROBBERY — PIRACY — RECEIVING STOLEN PROPERTY.

Forgery is the false making, or materially altering, of an instrument in writing, which, on its face, appears to create a legal liability, or to prejudice the rights of another person, either real or fictitious, with the intent to fraudulently utter it as the act of such other person.

To constitute the offense there must be false making, or fraudulent altering, of an instrument which may be the subject of forgery, with a fraudulent intent.[83]

There is a false making if the writing purports to be the act of some one other than the person actually signing.

An instrument is false if it is not what it purports on its face to be. If the writing really is what it purports to be, then there is not a false making, and the crime of forgery has not been committed.

Thus, if one endorses the name of another to a bill of exchange and by that means procures the money, he is guilty of forgery; but if he endorses his own name on the bill of exchange, as attorney for the person for whom the draft is payable, he is not guilty of forgery, even though he was not authorized to sign.

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[83] Blackstone defines forgery to be "the fraudulent making or altering of a writing to the prejudice of another man's rights." 4 Blk. Com., 247.

since the endorsement is what it purports to be; i. e., the endorsement, not of another, but of an alleged agent, and there is no false making, but merely a false assumption of authority.[84]

The false making need not to be so perfect as to impose on one familiar with the handwriting of the party, but it is sufficient if it is adapted to mislead.[85]

The false making may consist in the signing of another's name without authority, or by writing or printing matter over another's genuine signature,[86] or by falsely filling in blanks,[87] or by the use of the

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[84] Com. vs. Baldwin, 77 Mass., 187; Com. vs. Foster, 114 Mass., 311; Man vs. People, 15 Hun. (N. Y.), 155; State vs. Wilson, 28 Minn., 52; State vs. Young, 46 N. H., 266; Hulborn's case, 1 Park Cr. Cases, N. Y., 429.

[85] Com. vs. Stephenson, 65 Mass., 487; Garmire vs. State, 104 Ind., 444; Com. vs. Smith, 24 Mass., 137; State vs. Carr, 5 A. H., 367. In the case of U. S. vs. Sprague, 11 Biss. C. C., 376, the court says, "It is not necessary that the similitude should be such as to deceive experts or cautious men; it is sufficient that it be calculated to deceive honest, sensible and unsuspecting men of ordinary observation, and careful dealing, with a man supposed to be honest.

In State vs. Covington, 94 N. C., 913, the court held that an indictment would lie for the forgery of an obligation, although the signature was misspelled. See also Gooden vs. State, 55 Ala., 178.

In the case of Garmire vs. State, 104 Ind., 444; 5 Am. Cr., 238, the court says, "It is sufficient in such a case as this if the instrument bear such a resemblance to the document it is intended to represent as is calculated to deceive. One who intends to commit a felony and succeeds in accomplishing his evil purpose cannot escape the consequence of his crime by denouncing as stupid the man who trusted him. Nor can he be heard to aver that if the man whom he did defraud had been more vigilant the crime could not have been perpetrated."

[86] Caulkins vs. Whistler, 29 Ia., 416.

[87] Thus it is forgery for an agent to fill up blanks other than those instructed, or for an agent to fill out a blank with a larger sum than authorized. See State vs. Flanders, 38 N. H., 324; State vs. Kroegerer, 47 Mo., 552; Biles vs. Com., 32 Pa. St., 529.

name of a fictitious or deceased person,[88] or, under some circumstances it may be committed by the use of one's own name,[89] and some courts have held that to procure a genuine signature fraudulently was forgery,[90] or by making false entries in books of account,[91] or by procuring with fraudulent intent an

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[88] It is not essential to the offense of forgery that an instrument should be a binding obligation if genuine; it is sufficient that it purports to be good, therefore the use of a name of a fictitious or deceased person, if with the intent to defraud, is forgery.

The drawing or accepting of a draft or the making of a note purporting to be one of a bank which has no existence, is forgery. State vs. Twiner, 32 U. S., 132; State vs. Givens, 5 Ala., 747; Phillips vs. State, 17 Ga., 459; State vs. Hayden, 15 N. H., 355. But the signing of a fictitious name is not forgery where it is adopted as an alternative name of the accused party. Com. vs. Baldwin, 77 Mass., 11.

[89] Where one of two persons of the same name signs his own name, with the intention that it be used as the name of another, he commits forgery, as, where one of the same name obtains possession of a check or note payable to another, and endorses it, knowing that he is not the person to whom it is payable. Com. vs. Foster, 114 Mass., 311; Barfield vs. State, 29 Ga., 127; Graves vs. American Exchange Bank, 17 N. Y., 205.

[90] State vs. Schwitleff, 18 Me., 368.

The weight of authority, however, seems to be that the procuring of a signature to an instrument, by a misrepresentation of its contents, or the falsely reading of it to the parties to be bound, is not forgery, but obtaining of a signature by false pretenses. Commonwealth vs. Sankey, 10 Harris, Pa., 390; 1 Yerg. (Tenn.), 76; Wells vs. State, 89 Ga., 788.

[91] Not every false entry made in books of account is a forgery. False entries made by clerks or bookkeepers in the books of account of another, with the intent to deceive or defraud, are forgeries, since they are the false making of writings which appear to have a legal efficacy, for the entries are admissible in court as evidence of debt.

innocent party to sign the name of another to an instrument.[92]

Any material alteration, erasure, or addition, to a written instrument, which may be the subject of a forgery, if done with a fraudulent intent, is a forgery.

The alteration, erasure or addition must be material.

It is not forgery to add words which if absent would be implied by law,[93] or to add a witness' name to a bond or other instrument which the law does not require to be witnessed,[94] since such alterations do not change the legal effect of the instrument.

People vs. Phelps, 49 How. Pr. (N. Y.), 462; Biles vs. Com., 32 Pa. St., 529.

False entries, however, by a person in his own books may or may not be a forgery. The test is clearly pointed out by Mr. Bishop; he says: "In order to render a false entry or alteration in such book a forgery, it must purport to be what it is not, and to be of legal validity. If one fraudulently alters a book of account, whether originally kept by himself or another, it ceases to be what it purports to be, namely the actual record of transactions made when they occurred. Therefore he commits forgery. But if he simply enters a false charge against one, he does not thereby substitute a false record for the true original; he merely creates an original record which is not true in fact. To do this is not forgery. But suppose he makes a false charge which he antedates, falsely appearing to have been made at the time of the transaction, with the fraudulent attempt to pass it off as an original entry, then the question is the same as where a man antedates his own deed for a fraudulent purpose. Still, in all these circumstances, the book of accounts, like any other writing of which forgery may be committed, must be of some real or apparent legal validity." See Barnum vs. State, 15 Ohio, 717; Biles vs. Com., 32 Pa. St., 529. In re Tully, 20 Fed. Rep., 812; and see State vs. Young, 46 N. H., 266.

[92] Gregory vs. State, 26 Ohio St., 510; 2 Am. Cr., 146.

[93] Hunt vs. Adams, 6 Mass., 519; Jackson vs. State, 72 Ga., 28.

[94] State vs. Gherkin, 7 Ired., 206.

It is forgery, however, to alter the amount of an obligation,[95] or to erase the signature thereon and substitute another,[96] or to change the date when it is material, [97] or to alter one's own note after it has been delivered.[98]

Only such instruments as are in writing, and which, on their face, appear to create a legal liability, or prejudice the rights of another, may be the subject of forgery.

The nature or form of any instrument in writing is immaterial, for any writing that may be the means of defrauding another may be the subject of a forgery. The instrument may be in the form of bank notes,[99] bank checks,[100] bonds,[101] promissory notes,[102] receipts,[103] deeds,[104] mortgages,[105] railway tickets,[106] etc.

The instrument must appear on its face to be of some legal efficacy. If an instrument is invalid on its face it cannot be the subject of a forgery, since

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[95] White vs. Huss, 32 Ala., 470; State vs. Woodward, 20 Ia., 541.

[96] State vs. Robinson, 16 N. J. Law, 507; Com. vs. Welch, 148 Mass., 296; State vs. Davis, 53 Ia., 252; Com. vs. Ladd, 15 Mass., 526.

[97] State vs. Kattlemann, 35 Mo., 105; People vs. Graham, 6 Park Cr. Cases, N. Y., 135.

[98] State vs. Young, 46 N. H., 266; Com. vs. Mycall, 2 Mass., 136.

[99] State vs. Van Hart, 17 N. J. L., 327; Thompson vs. State, 9 Ohio St., 354.

[100] Hawthorn vs. State, 56 Md., 530.

[101] Bowles vs. State, 37 Ohio St., 35.

[102] People vs. Frank, 28 Cal., 507; Cross vs. People, 47 Ill., 152.

[103] State vs. Reeve, 27 Minn., 315; Com. vs. Lawless, 101 Mass., 32.

[104] Algood vs. State, 87 Ga., 668.

[105] People vs. Sharp, 53 Mich., 53.

[106] Com. vs. Ray, 69 Mass., 441.

it has no legal tendency to defraud, for every one is presumed to know the law. Thus it is not forgery to counterfeit a bank note which the statute declares to be void.[107]

This general rule is probably subject to a limitation that the false making of an instrument, invalid on its face, may be forgery, if there exists extrinsic facts by which the forger may be enabled to defraud another.[108]

On the other hand, however, if an instrument is valid on its face, but is rendered invalid by extrinsic facts, it may be the subject of forgery, since one is not legally presumed to know facts.[109]

INTENT.

As in most other crimes, the intent in forgery is an essential element. The crime is complete when there has been a false making or material alteration with the intent that the same shall be taken as genuine. It is not necessary that the forgery should have been uttered, or that any one should have been actually deceived.[110]

If this intent to pass off the instrument as the act of another exists, the instrument is a forgery, although the signature is actually the same name as that of the person signing it, or although the name is that of some fictitious person, providing there is an intention to defraud by the deception as to the iden-

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[107] People vs. Tomlinson, 35 Cal., 503; Wallman vs. People, 67 Ill., 91. It has also been held that a letter of introduction "to any railroad superintendent" bespeaking the courtesies toward the bearer, has no legal validity and affects no legal rights, and is not the subject of a forgery. Waterman vs. People, 67 Ill., 91; 1 Am. Cr., 225.

[108] Rembert vs. State, 53 Ala., 467; 2 Am. Cr., 141.

[109] People vs. Hilton, 35 Kan., 338; 8 Am. Cr., 261; People vs. Galloway, Wend., 540, 542.

[110] Com. vs. Ward, 2 Mass., 397; Williams vs. State, 61 Ala., 33.

tity of the person signing the same,[111] even though the person so signing it intended to pay the same before maturity.[112]

UTTERING.

Uttering a forged instrument consists in the offering, or delivering to another, with intent to defraud, forged instrument, accompanied by a declaration or assertion, by words, or action, that the same is genuine, with a knowledge that such assertion or declaration is false.

It is a distinct offense from forgery, and is a misdemeanor at the common law.

An offering, without a delivery or an acceptance, is sufficient if the other requisites are present to make one guilty of the offense.[113] Thus, where one offered to a bank official a forged mortgage and asked that money be advanced on it, but was requested by the official to return on the next morning, which he did, and was arrested without further negotiations, the court held that these facts constituted an uttering.[114]

In that case the court says: "To constitute an uttering, it is not necessary that the forged instrument should have been actually received as genuine by the party on whom the attempt to defraud is made. To utter a thing is to offer it, whether it be taken or not. * * * A receipt may be uttered by the mere exhibition of it to one from whom the party is claiming credit for it, though he refuses to part with its possession." [115]

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[111] Com. vs. Costello, 120 Mass., 370.
[112] Com. vs. Hervy, 118 Mass., 460.
[113] U. S. vs. Nelson, I Abb. U. S., 135; State vs. Horner, 48 Mo., 520.
[114] People vs. Caton, 25 Mich., 388.
[115] People vs. Caton, 25 Mich., 388.

The offer or delivery of the forged instrument may be accomplished in a number of ways, as depositing in a bank notes with forged endorsements,[116] the putting on record of a forged mortgage,[117] pledging a forged instrument as a security,[118] etc.

To constitute the offense there must be an intent to defraud, but it is not neecessary that the accused should actually deceive anyone.

The offense is complete when one offers the forged instrument with an intent to defraud. The fact that nobody was deceived, or parted with anything on the strength of such offer, is immaterial, for it can make no difference in reason or morals that after the defendant had done all that was necessary to accomplish his illegal purpose, he was foiled in the attempt.[119]

The intent to defraud will be inferred from the circumstances, and the fact that one uttered an instrument which he knew to be false, has been held to be sufficient proof of an intent to defraud.[120]

At the common law the possession of a forged instrument with intent to defraud did not of itself make one guilty of the offense, for as we have seen, there must be some attempt or offer, however slight,

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[116] State vs. Redstrake, 39 N. J. Law, 365.

[117] Perkins vs. People, 27 Mich., 385. In this case the court held, in addition to the statement in the text, that the collecting of money on a false mortgage, although it was not produced, was an uttering. "Every receipt of money and indorsement thereof upon the forged paper, was making use of it in a way implying an assertion of its genuineness and was a sufficient publishing of the instrument as true to make the offense complete."

[118] Thormond vs. State, 25 Tex. App., 366.

[119] People vs. Brigham, 2 Mich., 550.

[120] Com. vs. Whitney Thack (Mass.), C. C., 588.

to deceive another. Under some of the statutes it is now an offense to have in one's possession a forged instrument with the intent to pass it as genuine.

The mere offering without any verbal statement is a sufficient assertion that the instrument is genuine.[121]

The student will understand that in speaking of a forged instrument, we refer to an instrument which on its face has apparent legal validity, and not to every forged instrument, for the uttering of an instrument that has no apparent validity does not constitute the offense we have been discussing.[121]

ROBBERY.

Robbery is the taking with felonious intent, of the money or goods of another, from his person, or in his presence, against his will, by violence, or by putting him in fear.[122]

Larceny is an offense against property. Robbery is an offense not only against property, but also against the person.

Robbery is a larceny with aggravating circumstances. These circumstances distinguish the crimes of larceny and robbery from each other.

To constitute the crime of robbery, there must exist all the essential elements of the crime of larceny, and in addition thereto, the larceny must be from the person of another, or in his presence, and it must be accompanied by violence, or a putting in fear.

The crime of larceny has been heretofore discussed, so that it is only necessary to consider those addi-

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[121] U. S. vs. Long, 30 Fed. Rep., 678.
[122] 4 Blk. Comm., 242.

tional circumstances which distinguish a robbery from a larceny. The larceny must be from the person of another or in his presence.

Property in the presence of another is deemed to be under his protection, and a taking of such property is constructively a taking from his person.[123]

It is difficult to define how far the protection of the person extends, and no general rule can be stated by which it can be determined in all cases what property shall be deemed to be in the presence of the defendant.[124]

The property taken must be such that it might be the subject of larceny.

To take one's own property by force, or to take the property by force which one believes in good faith is his own, is not robbery, since, as in larceny, the property must belong to another, and must be taken with felonious intent.

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[123] James vs. State, 53 Ala., 380.

[124] In State vs. Calhoun, 72 Ia., 432, the court held: "It is not necessary, in order to constitute the crime of robbery, that the property should be actually taken from the person of the victim, or from his immediate presence; and when the victim is bound in one room of the house, and through fear of personal violence, is induced to tell his assailant where his property may be found in another room, and the assailant goes into such room and finds and takes the property, this is 'taking from the person, within the meaning of the statute.'"

So when B was in his smoke-house, about fifteen paces from his house, defendant came up and said that if B put his head out he would "shoot it off." While B was thus detained a co-defendant entered the house and carried off valuables belonging to B, who did not know for what purpose he was being detained until defendant left. Held, a sufficient taking in the presence of B to constitute a robbery. Clements vs. State, 84 Ga., 660; 8 Am. Cr., 692.

As in larceny, the crime is committed, although the person robbed is not the owner of the property taken, providing it is taken from his possession.

VIOLENCE OR PUTTING IN FEAR.

The taking must be accompanied by violence or a putting in fear. If the taking be without force or putting in fear, it is only larceny.

Thus, where the defendant stealthily picked the pocket of the woman, who, discovering her loss, rushed upon him and struggled with him, the court held the crime was larceny from the person, and not robbery, for there was no attempt to use force or intimidate.[125]

VIOLENCE.

Violence or force is the gist of the offense of robbery.

This violence may be either actual or constructive.

ACTUAL VIOLENCE OR FORCE.

It is somewhat difficult to define what degree of actual violence is requisite to constitute the offense. It is well settled that a sudden snatching unawares from another, without any resistance, or unaccompanied by force or violence, is not robbery. If, however, there is a resistance, however slight, the offense is committed. Thus, the snatching of a watch attached by a chain, or the snatching of a diamond pin from the headdress with such force as to remove it with part of the hair, is robbery.[126]

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[125] Fanning vs. The State, 66 Ga., 167; 4 Am. Cr., 561.
[126] State vs. Gorhman, 55 N. H., 152.

Any force that overcomes an actual resistance, though slight, or which prevents such resistance, is sufficient for the purpose of this offense.[127]

If actual force is used, it is not necessary that the mind should be moved by fear; accordingly, where one is knocked senseless or is in such a state of insensibility as to be incapable of fear, a taking from his person is robbery.[128]

The force must be exerted with the intent to commit the robbery, and must be exerted prior to, or at the time of, the taking; thus, if property be taken from another without force, a subsequent struggle to get it back would not make the taking robbery.[129]

PUTTING IN FEAR.

The offense may be committed where no actual violence is used, by putting the person in fear. "If the taking be attended by such circumstances of terror, such threatening by word or gesture as in common experience are likely to and do create an apprehension of danger and induce a person to part with his property against his will, he is put in fear." [130]

This fear may consist in the fear of injury to the person, to property, and perhaps of injury to character. The fear of injury may be to one's own person, or to those near to him. The obtaining of property through fear of injury to character is not as a general rule robbery, for "the fear of being arraigned before those tribunals whose function it is to protect and vindicate innocence should not shake a firm

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[127] People vs. McGenty, 24 Hun. (N. Y.), 62.
[128] McDaniel vs. State, 8 S. & M. (Miss.), 401.
[129] Shinn vs. State, 64 Ind., 13; 3 Am. Cr., 396; Fanning vs. State, 66 Ga., 167; Thomas vs. State, 91 Ala., 34; Hanson vs. State, 43 Ohio St., 376; 5 Am. Cr., 625.
[130] Long vs. State, 12 Ga., 293.

mind of conscious rectitude so far from its propriety as to induce the surrender of property, or money, or other valuable thing, to the base accuser." In some States, however, the obtaining of money through the threat to accuse one of sodomy is robbery.

The reasoning of the courts which hold this doctrine "turns on the overwhelming and withering character of the charge and damning infamy so well calculated to unman and subdue the will and alarm the fears of the falsely accused." [131]

The fear must exist at the time of the taking, for any putting in fear subsequently to retain property taken is not sufficient to constitute the offense.

The taking must be against the will of the person robbed so that, as in larceny, voluntary consent to the taking is a good defense.

The crime of robbery embraces, as we have seen, larceny, so that if the additional circumstances which raise a larceny to a robbery be not proved, the prisoner may be found guilty of larceny.

RECEIVING STOLEN GOODS.

The offense of receiving stolen goods is committed where a person receives into his possession, with felonious intent, any stolen property, with knowledge that it has been stolen.

At common law the offense was a misdemeanor only, and the receiver could only be punished after the conviction of the thief, and then only for the misprision of felony.[132] The common law offense has been enlarged in England, and in probably all the

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[131] Brill vs. State, 7 Humph. (Tenn.), 45; Long vs. State, 12 Ga., 293.

[132] 2 Bish. Cr. Law, Sec. 1137.

States, by statutes which make it a substantive offense.[133] In most of the States it is punishable as a felony.

THE RECEIVING.

In order to consitute a receiving, for the purpose of this crime, it is not necessary that the stolen property should come into the actual manual possession of the defendant, but a constructive possession is sufficient, by which is meant that the property is so situated that it is so far under the control of the accused that he can direct the disposition of it.[134]

Accordingly, one is guilty if the goods be received with his knowledge that they were stolen, by his servant, who deposits the same in a place directed by the accused.[135]

The goods must be received from the thief or his agent,[136] and with the thief's consent, since to take them without this consent would be larceny.[137] If the goods be received from a receiver of stolen goods, the offense is not committed, but the student must be careful not to confuse a receiver of stolen goods with an agent of the thief, since a receiving from the latter would be criminal, if the other essentials of intent and knowledge were present.

If one finds property, which he has reason to believe was stolen, and conceals the same for the purpose of obtaining reward, he is guilty of the offense.[138]

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[133] People vs. Reynolds, 2 Mich., 422.

[134] Higgins vs. State, 41 Ala., 393; State vs. Scovel, 1 Mill (S. C.), 274; State vs. St. Clair, 17 Ia., 149.

[135] State vs. Stroud, 95 N. Car., 626. See Sanderson vs. Com., 11 Ky. L. R., 341; 8 Am. Cr., 687.

[136] Com. vs. White, 123 Mass., 430.

[137] 2 Bish. Cr. Law, Sec. 781.

[138] Com. vs. Moreland, 27 Pitts., L. J.; People vs. Wiley, 3 Hill (N. Y.), 194.

So, if the property be received with the purpose of aiding the thief, or preventing his discovery, or to prevent it being reclaimed by the owner, the offense is complete, even though it appear that there was no intent on the part of the receiver to make any gain or profit to himself.[139]

STOLEN PROPERTY.

The crime of receiving stolen property can exist only when the goods received have been stolen.[140] Stolen property does not include embezzled property, and receiving it is not a crime unless expressly made so by statute.[141]

The character of the goods as stolen goods, must exist at the time they are received.

If the stolen goods are returned to the owner, and are afterwards allowed, for the purpose of detecting the thief, to come into the hands of a receiver, the latter is not guilty of the offense, even though he believes the goods to be stolen, for the goods on their return to the owner are no longer stolen goods.[142] So also goods in the hands of a receiver of stolen

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[139] U. S. vs. Montgomery, 3 Sawy. U. S., 544; People vs. Reynolds, 2 Mich., 422; State vs. Twiner, 19 Ia., 144; Com. vs. Bean, 117 Mass., 141; People vs. Wiley, 3 Hill (N. Y.), 194; State vs. Pardee, 37 Ohio St., 63; State vs. Rushing, 69 N. Car., 29.

[140] Com. vs. White, 123 Mass., 430.

[141] Com. vs. Leonard, 140 Mass., 473.

[142] U. S. vs. De Bare, 6 Bess. (U. S.), 358. In this case it was held in a prosecution for receiving stolen postage stamps, there could be no conviction. It appeared that the thief deposited the stamps in an express office directed to the defendant, and after the arrest he gave a written order for the property to the postmaster, who took them and subsequently deposited them in the express office, and they were forwarded to the defendant, who received them.

goods, since they derive their character from the nature of the offense of him in whose possession they are, are not stolen goods.[143]

A wife cannot be guilty of theft from her husband, so that one receiving goods clandestinely taken by the wife from the husband, cannot be convicted of receiving stolen property.

KNOWLEDGE.

There must be a knowledge on the part of defendant, at the time he receives the goods, that they are stolen.[143]

Guilty knowledge is made out by proof that the defendant had good reason to believe that the property was stolen, or that it was received under such circumstances as would satisfy a man of ordinary intelligence and prudence that it was stolen.[144] This, of course, is to be taken with the qualification that the receiver did believe or was satisfied that the goods were stolen. And if the receiver has knowledge of the facts, but thought they constituted embezzlement and not larceny, this is no defense if they constitute a larceny.[145]

A wife does not commit the offense by receiving stolen goods from her husband. The receiving or possession of goods for which stolen goods have been exchanged is not receiving stolen goods.[146] But a

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[143] People vs. Montague, 71 Mich., 318.

[143] In the case of Com. vs. Leonard, 140 Mass., 473, the court says: "If the property had actually been stolen, a belief on the part of the defendant is tantamount to knowledge."

[144] Com. vs. Finn, 108 Mass., 485; Com. vs. Leonard, 140 Mass., 472; Tully vs. Com., 13 Bush (Ky.), 145; O'Connell vs. State, 55 Ga., 296; State vs. Hodges, 55 Md., 130; Mann vs. People, 60 Ill., 119.

[145] Com. vs. Leonard, 140 Mass., 473.

[146] U. S. vs. Montgomery, 3 Sawy (U. S.), 547.

change in the form of the property stolen, providing its substance is retained, is no defense. Thus the possession of a coin made from stolen gold dust was held sufficient to constitute the offense.[147]

FELONIOUS INTENT.

This is an essential element of the crime. If one receives stolen goods, knowing them to be stolen, yet, if his intent be honest, the offense is not committed. Thus one is not guilty who receives stolen goods with the intent to return them to the owner,[148] or if he detains goods under a bona-fide claim of right.[149]

PIRACY.

Piracy is an offense against the unwritten law known as the law of nations.

Piracy consists in committing those acts of robbery and depredation upon the high seas which if committed upon land, would have amounted to a felony.[1]

The United States constitution provides that Congress shall have power "to punish piracies and felonies committed on the high seas and offenses against the law of nations." [2] Congress, in pursuance of this power, has enacted that "Every person who, on the high seas, commits the crime of piracy as defined by

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[147] Ibid; Com. vs. White, 133 Mass., 430.

[148] Garcia vs. State, 26 Tex., 193; Aldrich vs. People, 101 Ill., 16; 4 Am. Cr., 534.

[149] State vs. Caveness, 78 N. Car., 484.

[1] 1 Russ on Crimes, 144. Kent defines piracy to be "robbery or forcible depredation on the high seas, without lawful authority and done amino furandi and in the spirit and intention of universal hostility. It is the same offense at sea with robbery on land." 1 Kent Com., 183.

[2] 1 Const. U. S., Art. 1, Sec. 8.

the law of nations; every seaman who lays violent hands upon his commander thereby to hinder and prevent his fighting in defense of his vessel or the goods intrusted to him; every person who, on the high seas, or in any open roadstead, or in any haven, basin or bay, or in any river where the sea ebbs and flows, commits the crime of robbery upon any vessel, upon any ship's company or lading; every person engaged in any piratical cruise or enterprise, or being of the crew of any piratical vessel, who lands from such vessel and on shore commits robbery; every person who commits on the high seas or in any river, harbor, basin or bay, out of the jurisdiction of any particular state, murder or robbery or any other offense, which if committed within the body of a county would be punished with death by the laws of the United States; every citizen who commits any murder or robbery, or any act of hostility against the United States, or against any citizen thereof on the high seas, under color of any commission from any foreign prince or state, or on pretence of authority from any person; every subject or citizen of any foreign state, who is found and taken on the sea, making war upon the United States, or cruising against the vessels and property thereof, or of the citizens of the same, contrary to provisions of any treaty, when by such treaty such acts are declared piracy, — is guilty of piracy, and shall suffer death." [3]

The student will notice that the above statute does not define the offense of piracy, and that it punishes many acts not included within the definition already given.

A case arose in which the officers and crew of the rebel privateer Savannah were charged with the

[3] U. S. Rev. Stat., 5368, 5374 and 563.

crime of robbery on the high seas under this statute, and in that case Judge Nelson pointed out the distinction between the offense of piracy under the law of nations and that of robbery under the statute. In that case the court says: "This (that is, piracy) is defined to be a forcible depredation upon property upon the high seas, without lawful authority, done animo furandi — that is, as defined in this connection, in a spirit and intention of universal hostility. A pirate (under the law of nations) is said to be one who roves the sea in an armed vessel, without any commission from any sovereign state, on his own authority, and for the purpose of seizing by force and appropriating to himself, without discrimination, every vessel he may meet. For this reason, pirates, according to the law of nations, have always been compared to robbers; the only difference being, that the sea is the theater of the operations of one, and the land of the other. And, as general, robbers and pirates upon the high seas are deemed enemies of the human race, making war upon all mankind indiscriminately, the crime being one against the universal laws of society, the vessels of every nation have a right to pursue, seize and punish them. Now, if it were necessary on the part of the government to bring the crime charged in the present case against the prisoners within this definition of robbery and piracy, as known to the common law of nations, there would be great difficulty in so doing, either upon the evidence, or perhaps upon the counts as charged in the indictment — certainly upon the evidence. For that shows, if anything, an intent to depredate upon the vessels and property of one nation only — the United States — which falls far short of the spirit and intent, as we have seen, that are said to constitute essential elements of the crime.

But the robbery charged in this case is that which the act of Congress prescribes as a crime, and may be denominated a statute offense as contradistinguished from that known to the law of nations." [4]

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[4] Warburton's trial of the officers and crew of the privateer Savannah, pages 370–371.

PERJURY.

CHAPTER VIII.

PERJURY — MAINTENANCE — CHAMPERTY — BARRATRY — CONTEMPT — COMPOUNDING CRIME — BRIBERY — ESCAPE — PRISON BREACH — RESCUE — OBSTRUCTING PUBLIC OFFICERS — UNLAWFUL ASSSEMBLY — ROUT — RIOT — AFFRAY.

Perjury is the wilfully, knowingly and corruptly giving of material, false testimony, in a cause or proceeding, pending in a court of justice, by one who has been lawfully sworn before an officer authorized by law to administer the oath.

At common law, to constitute the crime of perjury, there must be a lawful oath, a cause or proceeding in a court having jurisdiction of same, a false statement regarding facts material to such cause or issue, and such false statement must be made with a belief that it is not true at the time it is made.[16]

LAWFUL OATH.

The oath must be taken before a duly authorized officer.[17] There can be no conviction for a false oath

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[16] Perjury is defined by Bishop to be a wilful giving under oath, in a judical proceeding or course of justice, of false testimony material to the issue or point of inquiry. Stephens defines it as an assertion upon oath, duly administered in a judicial proceeding before a competent court, of the truth of some matter of fact, material to the question depending in that proceeding, which assertion the asserter does not believe to be true when he makes it, or of which he knows himself to be ignorant.

[17] Lambert vs. People, 76 N. Y., 220; Morell vs. People, 32 Ill., 499.

where the officer administering the oath did not qualify, or where he acted under a void appointment.[18]

The oath must be one that is required by law. By this phrase is meant that the thing sworn to must have some actual, or potential, legal efficacy. If the sworn statement is not a legal basis for an act, or a judgment, by a judicial officer, perjury cannot be predicated upon it. The facts sworn to may be material, yet the false oath will not amount to perjury if it performed no office in the cause or proceeding. Thus if one falsely swears to facts set up in an answer to a bill of complaint, which the law does not require to be made under oath, he is not guilty of perjury.[19]

A false oath then, if not required by law, or if required by law is taken before an unauthorized officer: that is, an officer not authorized to administer the oath in the case in question, is one upon which no conviction for the crime of perjury can be had. If these essentials exist, the manner in which the oath is administered is immaterial, providing that the person taking it takes it as being binding on him.[20]

The common law idea of an oath which still prevails through all statutory changes, is that it is a solemn ceremony, which the party taking it regards as something which touches his conscience, and, according to his religious standard, requires him to speak the truth. Therefore, at the common law, every man was sworn according to the method which was most binding upon his conscience. In the swearing of Chinese witnesses, a living cock has been

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[18] Turner vs. State, 8 Blackf., 154.

[19] Beecher vs. Anderson, 45 Mich., 543; People vs. Gaige, 26 Mich., 30.

[20] State vs. Gates, 17 N. H., 373; Van Dusen vs. People, 78 Ill., 645.

brought into court and beheaded as part of the ceremony. Jews have been permitted, or required, to keep the head covered while the oath was being administered. This idea is still a part of our law, and it is always competent, before administering the oath, to enquire of the party produced as a witness, what ceremonial he regards as binding him to speak the truth, or even to enquire into this from other sources of evidence, and to require the oath to be taken in such a manner as the court may be satisfied is most binding upon the conscience of the witness. But the oath, however administered, whether in manner required by the witness as binding upon his conscience or not, renders him liable to the pains and penalties of perjury if he wilfully swears to a falsehood which is material to the case.

MATERIALITY.

The false testimony must be material to the inquiry. It is not necessary that the testimony should be material to the main proceedings, but it is sufficient if it is material to any inquiry in proceedings subsidiary to it.

Material testimony is such that it tends, either directly or circumstantially, to affect the probability or improbability of any inquiry to be determined by the proceedings, or which affects the credibility of any witness thereto.[21]

If the testimony is material, it is no defense that the defendant was not a competent witness, or that

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[21] Com. vs. Grant, 116 Mass., 17; Jacobs vs. State, 4 Am. Cr., 465. Questions put to a witness on cross-examination, for the purpose of testing his credibility, are deemed material whether they tend to prove the issue or not, but the answers to such questions must have some legal bearing upon the question of the witness' credibility. Queen vs. Baker, 9 Am. Cr., 421.

he gave the testimony voluntarily and was not subpoenaed, or could not have been compelled to testify. Neither is it necessary that the false testimony should have been believed.[22]

THE JUDICIAL PROCEEDING AND JURISDICTION.

At common law the false testimony must be given in a judicial proceeding, or in the course of a trial.

The making of a false oath in any extra judicial matter is a misdemeanor at common law, and not perjury.[23]

The common law regarded a trial in which parties and witnesses confronted one another as an especially sacred proceeding. The essential thought in this theory still prevails.

It is immaterial whether the oath be taken in the presence of the court or out of it, as by affidavit, or whether it be taken in relation to the issue in the cause, or in a subsidiary proceeding incidental thereto, providing it is material, and is made to be used, or is actually used, in connection with any inquiry in the course of the judicial proceedings.[24] Thus it is perjury to make a false affidavit which is used in aid of a motion for a continuance, or a motion for a new trial.[25]

The court must have jurisdiction of the proceedings in which the false oath is made.[26]

If the court once acquires jurisdiction, mere irregularities in the proceedings thereafter will not constitute a defense to the crime.[27]

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[22] Chamberlain vs. People, 23 N. Y., 85; Mackie vs. People, 115 Ill., 312; 6 Am. Cr., 556; Pollard vs. People, 69 Ill., 148.

[23] State vs. Dayton, 33 N. J. Law, 49; State vs. Chamberlin, 30 Vt., 559.

[24] People vs. Fox, 25 Mich., 492.

[25] State vs. Chandler, 42 Vt., 446; State vs. Shupe, 16 Ia., 36.

[26] State vs. Furlung, 26 Me., 69.

[27] State vs. Lanelley, 9 Mo., 834.

INTENT.

As in most other crimes, the intent in perjury is an essential element. In perjury the apt technical word to express the wicked purpose of the false testimony is "corrupt."

The false oath must be made with the belief that the facts or opinion stated are not true.

It is not necessary that the facts should be untrue, for there may be a conviction for perjury though the facts stated were true, if the witness believed that he was testifying falsely.

The question to be determined is: Did the defendant believe what he swore to to be true? If not, he is guilty of perjury.[28] So, also, one is guilty of perjury who swears to that of which he has no knowledge.[29] One, therefore, is guilty of perjury if his intention is to falsify.

It is somewhat difficult, however, to define what amounts to an intention to deceive. One of the oldest and best statements of the law is made by Hawkins, and is as follows: "It seemeth that no one ought to be found guilty of perjury without clear proof that the false oath alleged against him was taken with some degree of deliberation; for if upon the whole circumstances of the case, it shall appear probable that it was owing rather to weakness than to perverseness of the party, as where it was occasioned by surprise or inadvertency, or a mistake of the true state of the question, it cannot but be hard to make it amount to voluntary and corrupt perjury."

If this intention to deceive does not exist, the fact that a person testifies to what is false does not make him guilty of perjury. Thus a false statement made

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[28] 2 Bishop Cr. Law, Sec. 1048.
[29] State vs. Gates, 17 N. H., 376.

inadvertently or by mistake, as where a witness is bewildered by cross-examination, is not perjury.[30]

For the same reason, the courts have held that a reckless disregard of truth by one who did not believe that he was swearing to an untruth, does not constitute perjury.

In the case of United States vs. Shellmire, Baldwin, 370, the court says: "His negligence or carelessness in coming to that belief or conclusion of mind, without taking proper pains to enable him to ascertain the truth of the facts to which he swears, does not make his oath corrupt, and perjury cannot be wilful where the oath is according to the belief and conviction of the witness as to its truth."

So, by the weight of authority, drunkenness, since it negatives the existence of a specific intent to commit perjury, may be a good defense.[32]

STATUTES.

In most, if not all the states, the crime of perjury has been extended by statute. It now generally includes not only false oaths taken in judicial proceedings, but also false statements in regard to any matter or thing respecting which an oath is authorized or required by statute.

It is now generally true that every sworn statement, which may be a lawful basis for an official act of a public officer, whether executive or judicial, may be the subject of a charge of perjury.

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[30] Hood vs. State, 44 Ala., 81; U. S. vs. Stanley, 6 McLean, 409.

[32] Lule vs. State, 31 Tex. Cr. R., 103; McLeod vs. State, 83 Ga., 521.

SUBORNATION OF PERJURY,

Is the procurement of a person to commit perjury, which he actually commits in consequence of such procurement.[33] The crime is not complete until the false oath is taken.[34]

In the case of Commonwealth vs. Douglas, 5 Met. (Mass.), 241 the court clearly indicates what amounts to a procurement. It says: "To constitute subornation of perjury, the party charged must have procured the commission of the perjury by inciting, instigating, or persuading the guilty party to commit the crime. The calling of a witness to testify, with the knowledge or belief that he will testify falsely, is certainly not sufficient to constitute the crime of subornation of perjury."

Under the statutes, the attempt to incite or procure any person to commit the crime of perjury, even though no perjury be committed, is generally made a crime.

MAINTENANCE AND CHAMPERTY.

Maintenance is an officious intermeddling in a suit that in no way belongs to one, by maintaining or assisting either party with money or otherwise, to prosecute or defend it.[50]

Champerty is a species of maintenance, and is the unlawful maintenance of a suit in consideration of a part of the debt or other thing in dispute.[51]

Maintenance and champerty are offenses against public justice, and the necessity for punishing them

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[33] Hawkins P. C., Ch. 87, Sec. 10.
[34] Com. vs. Douglas, 5 Met., 241.
[50] 4 Blk. Com., 134.
[51] Hawkins.

arose in a state of society in which justice was so weakly administered, that an opportunity was presented for the oppression of poor and uninfluential litigants.

It was the practice of many who, when they thought they had title or right to any land, for the furtherance of their pretended right, conveyed their interest in some part thereof to great persons, and with their countenance did oppress the possessors. * * * The power of great men to whom rights of action were transferred, in order to obtain suit and in suits brought to assert those rights, the confederacies which were thus formed, and the oppression which followed from the influence of great men in such cases, are themes of complaint in the early books of English law. While the power of nobles and great men was felt in the administration of justice, these practices seem to have produced real and great evils." [52] In the present condition of society, most of the acts which at common law amounted to a maintenance are now not regarded as criminal. And as a general rule, the maintaining of another in a suit is regarded now as an offense only when it is officious, and with the purpose of perverting justice, so that "if unlawful ends are not contemplated, the combination is not criminal, though it be to use the courts of the country for establishing or defending against a private claim." [53]

The most common example of champerty is an agreement, by an attorney, to prosecute a claim at his own cost, and take as compensation part of the proceeds. In this country the law as to maintenance and champerty has been modified and, in some states, re-

[52] Thallhimer vs. Brinkertoff, 3 Cow. (N. Y.), 623.

[53] Stanley vs. Jones, 7 Bing., 369; Thompson vs. Marshall, 36 Ala., 504.

jected. Thus, in Michigan a statute has been passed permitting an attorney to agree with a client as to compensation, which at common law was champertous.[54]

COMMOM BARRATRY.

Common barratry is defined by Blackstone to be the offense of frequently exciting and stirring up suits and quarrels between his majesty's subjects, either at law or otherwise.[55]

The student will notice from the above definition that the offense is cumulative. A barrator in order to be guilty of this offense must be a common barrator, and the commission of one act of barratry does not make one guilty of the offense. Some authorities hold that there must be at least three acts of barratry.[56] One does not commit the offense by maintaining false actions in his own right unless "such actions be merely groundless and vexatious without any manner of color and brought only with a design to oppress the defendants."

CONTEMPT OF COURT.

It is impossible to define this offense so that the definition will be in harmony with all the adjudicated

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[54] Howell's St., Sec. 9004. See also Blaisdale vs. Ashern, 144 Mass., 393; Winslow vs. Cent. R. R., 71 Ia., 197; Dume vs. Herrick, 37 Ill., App. 180.

[55] 4 Blk. Com., 133. Hawkins defines a barrator to be "one who is a common mover, exciter or maintainer of suits or quarrels in courts or in the country, including all kinds of disturbances of the peace, and spreading false rumors and calumnies through which discord may arise among the neighbors."

[56] Com. vs. Pray, 13 Pick., 359; Com. vs. Davis, 13 Pick., 432; 1 Haw. P. C., Ch. 81.

cases.[1] The offense was established at the common law for the purpose of protecting the courts of justice, by maintaining their dignity, authority and efficiency. Accordingly, at common law, courts of record were vested with power to punish any conduct which hindered or obstructed their function of administering the law. And, as the courts also have the power of enforcing their orders, a distinction was established between contempts, which consist in the failure to obey the executive orders of the court, made to compel the performance of an act or duty, for the benefit of another party to the cause, and of contempts which obstruct the administration of justice.

The former of these contempts is called a civil contempt, for, while obedience to such an order of the court may be enforced by imprisonment, yet such an imprisonment is not punitory.

The latter contempt is punished by law, and has all the essentials of a crime, and is therefore called a criminal contempt.[2]

This distinction in contempts is pointed out in the case of Phillips vs. Welch, 11 Nev., 187, in which the court says: "If the contempt consists in the refusal of a party to do something which he is ordered to do, for the benefit or advantage of the opposite party, the process is civil, and he stands committed until he complies with the order. The order in such a case is not punitive, but executive. If, on the other hand, the contempt consists in a threatened act, injurious

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[1] The essence of a criminal contempt may be stated as: "Such conduct towards a court or a judicial officer as is designed, or naturally tends to, obstruct or embarrass, the judicial administration of justice, or is designed, or tends, to corrupt it, by holding out considerations which the minister of justice cannot honestly regard." See People vs. Wilson, and note 1 Am. Cr. Rep., 107.

[2] State vs. Knight, 3 So. Dak., 509; 9 Am. Cr., 221.

to the other party, the process is criminal, and conviction is followed by a fine or imprisonment, or both, which is purely punitive. In the former case, the private party alone has an interest in the enforcement of the order, and the moment he is satisfied, the imprisonment terminates; in the latter, the state alone is interested in the enforcement of the penalty. It is true, the private party receives an incidental advantage from the infliction of the penalty; but it is the same sort of advantage which accrues to the prosecuting witness in a case of assault and battery, the advantage being that the punishment operates in terrorem, and by that means has a tendency to prevent the repetition of the offense." [3]

Criminal contempts, then, consist in conduct which interferes with the court, and which prevents or obstructs, or has a tendency to prevent or obstruct, the administration of the law, or impair the respect due to the authority of the court.

Criminal contempt may be committed in the presence of the court (facie Curiae), sometimes called a direct contempt. Thus, to strike an attorney in the court room, to call another a liar, or to make a breach of the peace in the court room; [4] violent language and disturbance in a hall adjoining the court room, within the hearing of a court in session.[5]

The offense may be committed out of the court by various persons, and such a contempt is sometimes called a constructive, or consequential, contempt.

Constructive contempt may be committed by inferior judges as by usurping jurisdiction or by dis-

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[3] State vs. Knight, 3 So. Dak., 509; 9 Am. Cr., 221.

[4] Holman vs. State, 109 Ind., 513; U. S. vs. Patterson, 26 Fed. R., 509; U. S. vs. Emerson, 4 Cranch, U. S., 188.

[5] U. S. vs. Emerson, 4 Cranch C. C., 188.

obeying writs issued out of superior courts;[6] by sheriffs, bailiffs and jailors and officers of the court, by abusing the process of the law, or by corrupt and wrongful conduct, in respect to official matters. Thus a sheriff is guilty of contempt by not turning over money collected;[7] by attorneys, solicitors, etc., by gross instances of fraud; by jurymen in collateral matters relating to their office, as by making default when summoned, refusing to be sworn or to give a verdict; by witnesses, as by failing to appear when summoned, or in refusing to testify under some circumstances.[8]

In a recent case the Circuit Court of the United States punished for contempt persons who violated an injunction which had been issued against unlawful interference with railroad trains engaged in the transmission of the mails, and the jurisdiction was upheld.[9]

The publication in newspapers, or elsewhere, of articles which tend to embarrass the courts in the administration of the law, is criminal contempt.[10]

It is impossible to call the attention of the student to all acts which may be contempt of court, and we cannot do more than give a general statement by which the reader can determine what amounts to a contempt. Essentially, a contempt of court is conduct which interfers with the proceedings of the court. Something which hinders, prevents, or obstructs, its function of administering the law. If it has this effect, or this tendency, it is contempt, no matter from what motive it proceeds. If

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[6] Harris Cr. Law, p. 89, Swift vs. State, 63 Ind., 81.
[7] 5 Johns, N. Y., 356; Harris Cr. Law., 89.
[8] Wilson vs State, 57 Ind., 71; 2 Am. Cr., 182.
[9] Re Debs, 158 U. S., 564.
[10] People vs. Wilson, 64 Ill., 195; 1 Am. Cr., 107.

it has not this effect, the personal animus or feeling of the actor, or the insult or injury to the judge, will not make it a contempt. It is not, then, the entertaining, or the exhibiting a personal feeling, or opinion, that the act of a judge is illegal or unjust, or that the individual who holds the office is unworthy to occupy the position, that constitutes contempt. It is not for the purpose of stifling criticism of judicial action, or protecting the individual character of a judge from attack, that the power of punishing contempt is given to courts. For wrongs to the character and reputation of a judge, for insults to his feelings, he has the same and no other remedies than the law accords to every citizen. He may not use the power to punish for contempt to avenge a personal injury. To suppose that it is a method of punishing a personal insult or injury, would be to concede that this is a proceeding in which a man may be a judge in his own cause, a doctrine most abhorrent to the law, and to our ideas of justice.[11]

COMPOUNDING CRIME.

Compounding crime is an agreement with one who has committed a crime, not to prosecute, on account of some reward received or promised.

A common form of the offense is what was anciently called "theft bote," which is defined by Blackstone to be "where the party robbed not only knows the felon, but also takes his goods again, or other amends, on an agreement not to prosecute." [48]

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[11] For full and important collections of cases relating to criminal contempt, see the notes to People vs. Wilson, 1 Am. Cr., 107; People vs. Court of Oyer & Terminer, 6 Am. Cr., 163; U. S. vs. Latter Day Saints, 9 Am. Cr., 138.

[48] 4 Blk. Com., 133.

To constitute the offense there must be an agreement not to prosecute. Accordingly, the taking back of stolen property, without showing of favor to the thief, or agreement not to prosecute, does not make one guilty of the offense.

The reward need not be in money, but any consideration from the felon to the person agreeing not to prosecute is sufficient.

As a general rule the compounding of a misdemeanor is at common law an offense.

In some of the states the statutes provide that where a person is indicted for an assault or battery or other misdemeanor, for which the injured party might have a civil remedy, the proceeding may be stayed on an acknowledgment of satisfaction.[49]

BRIBERY.

Bribery consists in the giving to, or receiving by, any person in a public office, of some remuneration as a corrupt reward, to influence the receiver in the discharge of his public duty.

Under the definition given by Blackstone, bribery included only the giving or receiving of a bribe by an officer concerned in the administration of justice. The word bribery now has a much more extended meaning, and the offense may be committed by bribing not only a judicial, but also any public officer having a public duty to perform.[35] Any one owing only slight and occasional duty to the public is deemed a public officer for the purpose of the crime of bribery. Thus, it is bribery to solicit by corrupt influence the vote

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[49] Partridge vs. Wood, 120 Mass., 403; Saxon vs. Conger, 6 Oregon, 388.

[35] Shercliff vs. State, 96 Ind., 369.

of any one entitled to exercise that right, since voting is a public duty and is regarded as an official act.

The theory of the offense is that a public officer, in the discharge of his public duties, should be uninfluenced by other considerations than those of justice and the public good, and that the acts of such an officer, based upon other considerations, must necessarily prevent justice and wrong the community. So that the giving of anything for the purpose of inducing or influencing official action, from other motives from those stated, is bribery, and the receiving of anything as a corrupt reward for official action is bribery.

And since the mere giving or receiving of any reward has, of itself, a tendency to corrupt official action, it is immaterial whether or not such a giving or receiving is followed by the official act bargained for, or any official act at all.[36]

And for the same reason, as we shall afterwards see, the offer to give a bribe, although unaccepted, subjects one to the same punishment as though the same was accepted.[37] Thus the offer to voters by a candidate for office, that if elected he would return a portion of his salary, and thereby reduce the taxes, was held to be within the spirit of the law of this offense and constituted bribery.[38]

There is some confusion in the reports and with text writers as to whether an attempt to bribe is an attempt, or a substantive offense. The distinction is of little consequence, for the student can readily see that one offering to give or receive a bribe is equally culpable, whether the offer be accepted or not, and

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[36] Com. vs. Murray, 135 Mass., 530.
[37] Walsh vs. People, 65 Ill., 58; State vs. Ellis, 33 N. J., 102.
[38] State vs. Purdy, 36 Wis., 313.

the offerer is accordingly punishable, the same as if it had been accepted.[39] The statutes do not recognize any difference between an attempt to bribe and an actual bribing.

The subject of bribery is now generally if not entirely regulated by statute.

ESCAPE.

Escape is an offense committed,

1. Where one, being under lawful confinement, voluntarily departs therefrom, without a breaking of prison.

2. Where a person who has the lawful custody of a prisoner, voluntarily, or negligently, allows him to escape before he is legally discharged.

1. It may be committed by the prisoner himself, for in escaping he is guilty of contempt in not submitting himself to the judgment of the court, whose function it is to vindicate the innocent and to punish the guilty.

"All persons are bound to submit themselves to the judgment of the law and to be ready to be justified by it; and therefore, whoever, in any case, refuses to undergo that imprisonment which the law thinks fit to put upon him, and frees himself from it by artifice, before such time as he is delivered by due course of the law, is guilty of a high contempt and punishable with fine and imprisonment."

This duty of submission to lawful restraints is equally obligatory upon the innocent and the guilty. Thus the courts have held that the fact that the prisoner was innocent of the charge upon which he

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[39] Walsh vs. People, 65 Ill., 58.

was arrested, or the fact that he was afterwards acquitted of the same, does not amount to a justification of the escape.[40]

So also the consent of the officer having him in custody is no defense, since it does not alter his duty to public justice, and gives him no right to escape.[41]

It is essential, however, that there should be an actual arrest, and a lawful detention at the time of the escape. To constitute an arrest it is not necessary that there should be a manual touching of the body, but it is sufficient if the party be within the power of the officer.[42] There seems to be some doubt at common law whether the offense was committed where the detention was under process in a civil cause. The better opinion seems to be that the offense is committed by escaping from civil process, and it is so held under the statutes.[43]

If the detention is not lawful the offense is not committed. Thus one who breaks from an officer acting under a void warrant is not guilty of the offense.[44] A void process is no process, and one detained under it is entitled to use sufficient force to regain his liberty.[45] The escape by the prisoner himself is only a misdemeanor at common law.

2. It may be committed by the person having lawful custody of a prisoner.

An officer, or private person, at common law, was guilty of an escape, if he allowed another lawfully in his custody to go at large without being legally dis-

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[40] State vs. Lewis, 19 Kans., 260.
[41] Com. vs. Sheriff, 1 Grant, Pa., 187.
[42] Emery vs. Shesley, 18 N. H., 198.
[43] Com. vs. Baker, 133 Mass., 399; Bishop Cr. Law, Vol. II, Sec. 1073.
[44] State vs. Leach, 7 Conn., 452.
[45] See ibid State vs. Leach.

charged. If he negligently allowed the prisoner to escape he was guilty of a misdemeanor, but if he voluntarily allowed the prisoner to escape, he was deemed guilty of the same offense as the prisoner, and became liable to the same punishment.

If the process is void, the officer or person permitting the escape (as in the case of a prisoner) is not guilty of the offense.[46]

PRISON BREACH.

Prison breach is the forcible breaking and going out of prison by a prisoner, lawfully confined therein.

To constitute this offense there must be a breaking with some force or violence, and an actual exit.

A breaking without an exit, or an escape without the use of some force, does not constitute the offense. As in the case of escape, the imprisonment must be lawful.

In the case of State vs. Leach, 7 Conn., 452, the court says: "A void process is no process. * * * It hence results that the keeper of the jail is vested with no authority; the building in which the prisoner was confined was not a jail, but, as to him, a mere private building, and hence he might regain that liberty of which he was unjustly deprived, and it is no part of the case that he made use of more force than was necessary to accomplish the object. Nor does the fact that he was confined with certain atrocious offenders, render it less proper for him to effect his escape."

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[46] Housh vs. People, 75 Ill., 487; 2 Am. Cr., 465.

A prison includes any place where one is lawfully confined. The offense is a misdemeanor or a felony, according as the offense for which imprisonment was made, was one or the other.

The offences of escape, rescue and prison breach are now generally regulated by statute.

RESCUE.

Rescue is the forcibly and knowingly delivering another from lawful custody.

Rescue differs from prison breach in that the latter is committed by the person himself, while the former is committed by a third person.

The delivery is not criminal unless the rescuer knew that the person was in custody.[47]

The offense is not complete until there is an actual exit by the prisoner.

OBSTRUCTING PUBLIC OFFICERS IN THE PERFORMANCE OF OFFICIAL DUTIES.

In order that government can be properly carried on it is necessary that every government officer should be unobstructed in the performance of official duty.[12] In legal theory, every public officer in the performance of an official duty represents the State, and has behind him the whole power of the government, in the lawful exercises of his official functions. He is, as it were, an arm of the State, which, through him, performs the duty and exercises the functions,

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[47] State vs. Hilton, 26 Mo., 199.

[12] An important modern case illustrating the principle under consideration is one in which it was held indictable to destroy a dead body in order to prevent the coroner from holding an inquest. Queen vs. Stephenson, 4 Am. Cr., 593.

which he, at the time, by virtue of his office, is called upon to execute and perform. And he is to be regarded in this light whether he is a so-called state officer, or county officer, or municipal officer. The state is the fountain head of all governmental authority, and no such authority is exercised by any officer except where he can trace his official authority, whether by virtue of a local municipal ordinance, or a public law of the state, to the fountain head. No just conception of government can be had by one who does not represent to himself the idea that every public officer, however humble his position, and however limited his sphere of action, is, so far as his official duty is concerned, a part of the government, of which the supreme power in the state, or the nation, is the head. It is not customary with us, as it is in some of the older countries, to put all public officers in uniform, nor to have them carry official badges, which are, after all, but emblems of the governmental authority by virtue of which they perform their public duties. But no executive officer of the most despotic form of government more truly represents the power of his master than the humblest public officer in the United States represents the authority of the state or the nation in whichever service he happens to be employed.

It is an indictable offense, at the common law, to purposely obstruct any officer in the performance of his official duties.

Under the general head of obstruction of public officers in the performance of official duties, many particular offenses must be classified. For instance, the statutes of the United States impose special penalties upon those who unlawfully and knowingly obstruct officials of the postal department when

transporting mail. In most, if not all, of the states, there are special statutes punishing acts resisting court officers; that is, officers whose special duty it is to execute legal process. Other statutes punish resistance of a lawful arrest, whether with or without a warrant. A criminal contempt of court, which, as is explained in the section devoted to that subject, is neither more nor less than an attempt to obstruct, pervert or corrupt, the course of public justice administered by the judicial branch of the government, belongs to this class of offenses. So there are special statutes punishing escapes, rescues, prison breaches, and the like, all of which offenses are properly classified under the general head of obstructing and resisting public officers in the performance of their duties. But without regard to any statute it may be said broadly, and generally, that it is a criminal offense to resist or obstruct any public officer when engaged in the performance of an official duty. It may be simply a tax officer,[13] or merely a supervisor of roads and highways of a township road district.[14] This last case (Woodworth vs. State, infra) deserves attention, because it illustrates the elasticity of the principles by which criminal statutes are construed. The statute which is construed in that case reads: "If any person shall abuse any judge or justice of the peace, resist or abuse any sheriff, constable, or other officer, in the execution of his office, the person so offending shall be punished," etc.

In this case the rule of construction which we have drawn attention to elsewhere was invoked; that is, it was contended that the statute was intended to reach only a judicial officer, or officers connected with the administration of justice, and that, in conformity

[13] Boyd vs. State, 19 T., 466.
[14] Woodworth vs. State, 26 Ohio St., 196.

with a principle frequently applied in the interpretation of criminal statutes, the words "other officer" in the statute should be limited to other officers of the same general character as those particularly enumerated. And this is undoubtedly the general rule of construction, and especially is it so where the statute creates a new offense. But, in this case, the statute was intended simply to fix the punishment of acts which were offenses at the common law, and, therefore, the court had recourse to the common law as a rule of interpretation in construing the statute in question, and properly held that a township supervisor of roads and highways was within the statute.

Obstructing and resisting an officer de facto is as much an offense as though he were an officer de jure.

This is in accordance with a general principle which pervades our law, that the official acts of an officer de facto; that is, an officer exercising the functions of an office under color of title, have the same legal efficacy and validity as those of an officer de jure. Whether a man is rightfully an officer or not is only to be tried in a direct proceeding for that purpose.[15]

UNLAWFUL ASSEMBLY, ROUT AND RIOT.

These are three allied offenses against the public peace.

Unlawful assembly is the assembly of three or more persons, with an intent to do that, which, if done, would make them rioters.

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[15] State vs. Dierberger, 90 Mo., 369; Floyd vs. State, 70 Ala., 39; State vs. Watson, 66 Iowa, 670; State vs. Boies, 34 Me., 235.

A rout is the disturbance of the peace by three or more persons, who, having assembled together, with an intention to do that, which, if done, would make them rioters, make toward the execution of their purpose, an advance or motion, which nevertheless falls short of execution.[75]

A riot is a disturbance of the peace by three or more persons, who having assembled together, proceed and execute a lawful or unlawful purpose in a turbulent manner, to the terror of persons of reasonable firmness and courage.

The distinction between these offenses will more clearly appear by an example.

If ten men meet together for the purpose of taking a horse from the owner by force, this is an unlawful assembly. They proceed from the place of meeting toward the place where the horse is confined; this is rout.

They arrive at the owner's place and violently and forcibly remove the horse; this is riot.[76]

To constitute the offense of riot, the meeting need not be unlawful in the first instance. "It seems clear that if an assembly of persons met together, on any lawful occasion whatsoever, a sudden proposal should be started of going together in a body to pull down a house or enclosure, or do any other act of violence to the disturbance of the public peace, and such motion be agreed to and executed accordingly, the persons concerned cannot but be rioters, because their associating themselves together for such a new purpose is in no way extenuated by their having met at first upon another."

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[75] 4 Blk. Comm., 140.
[76] Bell vs. Mallory, 61 Ill., 167.

The gist of the offense is the acting in a way calculated to inspire terror or fear, and the innocent purpose does not excuse in the eyes of the law the tumultuous acts. Thus, the going in the night time in frolic, by three or more persons, upon the premises of another, and shaving the horse's tail, if it be accompanied by such a noise as to arouse and alarm the owner and his family, is a riot.[77] On the other hand, the assembling and execution of an unlawful purpose, if done peaceably, is not riot.

Actual violence need not be inflicted on any one, for any demonstration which strikes terror to a person of reasonable courage is sufficient to constitute the crime.[78]

In the case of State vs. Brazil, Rich (S. C.), 257, it was held that the blowing of horns and yelling in fun at night in a village constitutes a riot. In that case the court said: "If a tumultuous or noisy act be accompanied by no circumstances calculated to inspire terror or alarm in others, it would not amount to a riot; as if a dozen men assemble in a forest and blow horns and shoot guns or do such acts, it would not be a riot. But if the same party were to assemble at midnight in the streets of Charleston or Columbia, and went to march through the streets crying Fire! blowing horns and shooting guns, few, I apprehend, would hesitate in pronouncing it a riot, although there might be no ordinance of the city for punishing such conduct; and why? Because such conduct in such a place is calculated to inspire terror and alarm among the citizens."

It is not necessary that more than one be terrified.[79]

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[77] State vs. Alexander, 7 Rich (S. C.), 5.

[78] Fisher vs. State, 78 Ga., 258; People vs. O'Laughlin, 3 Utah, 133; 4 Am. Cr., 542.

[79] State vs. Alexander, 7 Rich. (S. C.), 5; Sander vs. State, 60 Ga., 126.

One present and abetting a riot is guilty of the offense, although he may not have rendered any active assistance.[80]

AFFRAY.

Affray is the unlawful fighting together of two or more persons in some public place, to the terror of the people.

The offense differs from an assault in that the latter has not the element of terror to the public, and may happen in private, and from a riot in that to constitute the latter, there must be three persons and premeditation.

To amount to fighting, actual blows must be struck; quarreling and violent words are not sufficient, since they in themselves are not supposed to produce that fear which amounts to a disturbance of the public peace.[81]

The fighting must be in a public place, by which is meant a place which is in public view. Thus, an enclosed lot ninety feet from the highway, in full view of the public, was held a public place.[82] A place surrounded by a wood, a mile away from a highway, was held to be a private place, and not one where fighting amounted to an affray.[83] So also a highway, if not in public view, is not necessarily a public place.[84]

One is not guilty unless he was unlawfully fighting. Accordingly one who is assaulted may use sufficient force to repel his assailant without being guilty of this or any other offense. Any person aiding or abetting the parties engaged in an affray is an accessory, and is guilty with the principals.[85]

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[80] Williams vs. State, 9 Mo., 268; Treat vs. Jones, 28 Conn., 334.
[81] O'Neil vs. State, 16 Ala., 65.
[82] Carwill vs. State, 35 Ala., 392.
[83] Taylor vs. State, 22 Ala., 15.
[84] State vs. Weekly, 29 Ind., 206.

BIGAMY.

CHAPTER IX.

BIGAMY — ADULTERY — LASCIVIOUS COHABITATION — SEDUCTION — INCEST — SODOMY — MISCEGENATION — ABORTION — NUISANCES.

Bigamy consists in the going through the form of marriage, by one who has a lawful husband or wife, with another person, with intent to contract a new marriage.

Bigamy or polygamy was not a crime at the common law, but was punishable only in the ecclesiastical courts of England up to the reign of James I. At that time a statute was passed which enacted that "if any person or persons within his majesty's dominion of England and Wales, being married, who shall hereafter, at any time after the ending of the session of the present parliament, marry any person or persons, the former husband or wife being alive, then every such offense shall be a felony."

The act exempted from its operation certain persons. Those persons exempted by the above statute and by acts amendatory thereof, were substantially as follows:

1. Any person marrying a second time, whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not have been known by such person to be living within that time.

2. Any person who, at the time of the second marriage, shall have been divorced from the bond of the first marriage.

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[85] Sikes vs. Johnson, 16 Mass., 389; State vs. Laurier, 71 N. Car., 288; State vs. Harrell, 107 N. C., 944; 8 Am. Cr., 36.

3. Any person whose former marriage has been declared void by the sentence of a court of competent jurisdiction.

4. Any person not a subject of Great Britain whose second marriage is contracted out of England.

The statute of James I. has not been recognized as a part of the common law of this country, except in the State of Maryland.

Bigamy, then, is a statutory crime, for the particular provisions of which the student must consult the statutes of his own state.

The statutes of the various states have substantially followed the statute of James I. with the corrections and amendments of which we have spoken above. We have set forth the features of the English statute in order that the student may get a general idea of the nature of the legislation in this country.

There are, however, some general considerations to which it is necessary to call the student's attention.

THE SECOND MARRIAGE

Marriage being the valid union of a man and a woman, it follows that the second ceremony is a mere form without any legal effect, and by a second marriage is meant only the going through the form of a marriage.

The gist of the offense consists in the going through the form of a second marriage, which "involves an outrage on public decency and morals, and creates a scandal by the prostitution of a solemn ceremony."

The offense is complete when the second marriage has taken place, and it is immaterial whether it be followed by cohabitation or not.

In some states where marriage may be contracted by mutual consent without the necessity of formal

acts, it has been held that a second marriage by mutual consent, followed by the mutual assumption of marital rights and duties, and cohabitation as man and wife, even though no ceremony is performed, is a sufficient basis for a prosecution for bigamy.[13]

The second marriage then, if it be contracted in such form and manner that it would be binding upon the parties if they were legally competent, is sufficient to make one guilty of the crime of bigamy.

It is no defense that the second marriage was one that could not have been of any effect, even if there had been no valid first marriage.

Thus, it is no defense that the second marriage was one between a white woman and a negro, which was prohibited by statute, for every bigamous marriage is void, and the fact that it was contrary to statute only adds an additional element of illegality.[14]

The fact that the second marriage is contracted in good faith is immaterial, for as we have seen, the gist of the offense is the going through of the form of marriage during the continuance of a valid marriage.

Thus it is no defense that the second marriage was contracted from a sense of religious duty;[15] or under the advice of counsel that there is no impediment to a second marriage;[16] or under a belief that there has been a valid divorce.[17]

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[13] People vs. Beevers, 99 Cal., 286; Com. vs. Lucas, 158 Mass., 81.

[14] People vs. Brown, 34 Mich., 339; 1 Am. Cr., 72.

[15] Reynolds vs. U. S., 98 U. S., 145. Com. vs. Nash, 7 Metc. (Mass.), 472. In some states an exception is made of persons who shall have good reason to believe that the absent spouse is dead. Mich. Comp. Laws, 11,692; Squire vs. State, 46 Ind., 459.

[16] People vs. Weed, 29 N. Y., 628.

[17] People vs. Dawell, 25 Mich., 247; Davis vs. Com., 13 Bush., Ky., 163; 2 Am. Cr., 163.

JURISDICTION.

The place of the second marriage is important as determining the jurisdiction of the court.

As a general rule, a court has jurisdiction only over those crimes committed within its territorial limits, so that there is no authority to punish a person marrying a second time out of the jurisdiction of the court.

The student must consult the statutes of his own state on this point. The statutes of a number of the states provide a punishment for the cohabitation in the state under a bigamous marriage which took place in some other state or county.[20]

THE FIRST MARRIAGE.

It is immaterial where the first marriage took place, or as a general rule, how it was celebrated, providing it is valid according to the laws of the place where it is contracted[21] if not incestuous by the law of nature.

If the first marriage is void for any reason, the second marriage is not bigamous, for it is not made during the continuance of a prior legal marriage;[22] but if the first marriage is simply voidable, and not void, it is no defense so long as it is not dissolved by the courts.[23]

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[20] Finney vs. State, 3 Head., 544; Mich. Comp. Laws, Sec. 11,691.

[21] Weinberg vs. State, 25 Wis., 370; Bird vs. Com., 21 Gratt (Va.), 800.

[22] Halbrook vs. State, 34 Ark., 511. The student must consult the law of his own state as to the requirement as to age and the effect of the want of age on the marriage.

[23] Shafer vs. State, 20 Ohio, 1; People vs. McQuaid, 85 Mich., 123.

DIVORCE.

Most, if not all, the statutes provide that a person who has been legally divorced from the bonds of matrimony (a vinculo) does not commit bigamy by marrying again. The divorce must be granted by a court having jurisdiction of the subject matter, and must not be procured by fraud. If the decree prohibits the guilty party from marrying during the life of the divorced party, the crime is committed if the guilty party marry again in that state.[24]

We may summarize the general and common features of legislation on the subject of bigamy as follows:

Any person who has a present husband or wife living, and goes through the form of marriage with

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[24] People vs. Faber, 92 N. Y., 146; Com. vs. Lane, 113 Mass., 458.

A peculiar case arose in New York which is interesting under this head:

The wife of M., a resident of New York, procured a divorce from him on account of his fault; the judgment forbade his marrying again. He thereafter went to the State of New Jersey, and there married during the life time of his first wife, and returned with his second wife to New York and resided there until his death. In an action of the plaintiff, a son born of the second marriage, to inherit as a lawful heir of M., the court held that at the time of the second marriage he had no former wife living within the meaning of the statute of New Jersey, which declared that "all marriages, where either of the parties shall have a husband or wife living at the time of such marriage, shall be invalid;" that the laws of New York and the provision of the judgment prohibiting marriage were of no effect in New Jersey, and M. had a right to marry in another state whose laws did not prohibit a second marriage by one divorced, and that the plaintiff was legitimate and entitled to inherit. People vs. Faber, 92 N. Y., 146; Moore vs. Hegeman, 92 N. Y., 521.

The marriage in a state other than the one in which the divorce was granted is not polygamous, unless the parties went there for the purpose of evading the law, and unless the second wife was a resident of the state which granted the divorce. Com. vs. Lane, 113 Mass., 458.

another person, is deemed guilty of bigamy or polygamy.

Exceptions:

1. A person whose husband or wife has been absent for a certain period of time, during which time such person had no knowledge of the existence of the absent spouse.

2. A person whose former marriage is void, or being voidable, has been annulled by a court of competent jurisdiction.

3. A person who has been legally divorced by a court of competent jurisdiction.

Under the decisions of some courts another exception is made in the case of persons marrying again with a reasonable and bona-fide belief that the former spouse is dead. These decisions are based on the principle that when the second marriage is contracted under an honest and reasonable belief in the existence of a state of facts which, if true, would afford a complete justification, both legally and morally, there is an absence of that criminal intent which is an essential element in every felony. Other judges have dissented from this reasoning, holding that it is the intention of the statutes that any person who marries another, during the life of his or her spouse, does so at his or her peril, and that the only defense under the statute is showing previous continuous absence for seven years without being heard from.

The student will find an interesting discussion of these opposing theories in the case of Queen vs. Tolson, 23 Q. B. Div., 168; 8 Am. Cr., 59; and in cases cited in the note.[25]

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[25] Regina vs. Moore, 13 Cox Cr., 544; 2 Am. Cr., 608; Com. vs. Mash, 7 Metc., 472.

The student will be careful not to confuse the reasoning of these cases in which the offense is committed, relying on a reasonable but mistaken belief in the existence of certain facts, with the reasoning of cases already cited where the mistake is one of law, for as we have seen, if one marries again, having a full knowledge of all the circumstances, an honest belief that the second marriage is valid is not a defense.[26]

ADULTERY.

The common law took notice of those acts which were injurious to the public at large.

It not only punished acts which amounted to a breach of the public peace, and acts injurious to the public health and comfort, but also acts injurious to the public morals.

Accordingly, we find that it punished such notorious and adulterous cohabitation as, by reason of its open and scandalous nature, tended to corrupt the morals of the community.

A single private act of adultery was not noticed by the common law, and, like fornication, it was "left to the feeble coercion of the spiritual court, according to the rules of the canon law, a law which treated the offense of incontinency, nay, even adultery itself, with a great degree of tenderness and lenity, owing perhaps to the constrained celibacy of its first compilers." [27]

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[26] Ante under title Intent; State vs. Goodenow, 65 Me., 30; 1 Am. Cr., 42.

[27] Blk. Com., Bk. IV., 64. It is stated by Buckle, in his History of Civilization, that by the rules of the canon law no cardinal can be convicted of incontinence except upon the testimony of seven eye witnesses to the fact. He adds that no cardinal has ever been convicted of this offense.

Adultery, then, at common law, is not a crime, unless so continued, open and notorious as to amount to a public nuisance.[28] By reason of this laxity in the common law the offense is now made punishable by statute in all of the states.

Some of the states define what constitutes the crime, while others simply provide that one guilty of adultery shall be punished in a certain way.

There is a considerable difference of opinion as to who can be guilty of the crime. Some of the courts define adultery to be sexual intercourse with a married woman by one other than her husband.

The student will notice that this definition includes only illicit intercourse with a married woman, and that the intercourse of a married man with a single woman would not make him guilty of adultery.[29]

The gist of the offense, according to the courts which adopt this definition, is the injury to the husband. "The heinousness of it consists in exposing an innocent husband to maintain another man's children, and having them succeed to his inheritance. * * * If the woman be single, her incontinence produces none of these evils, her issue takes away no man's inheritance, it can do harm to nobody, and all the burden of support is cast by law upon herself and the partner of her guilt." [30]

Under this definition the man and the woman are both guilty of the crime even though the man is unmarried.[31]

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[28] State vs. Moore, 1 Swan, Tenn., 136; State vs. Smith, 32 Tex., 167.

[29] State vs. Armstrong, 4 Tenn., 335; Com. vs. Elwell, 2 Metc. (Mass.), 190.

[30] State vs. Lash, 1 Harrison (N. J.), 380.

[31] State vs. Pearce, 2 Blackf., 381; State vs. Wallace, 9 N. H., 515.

This view of the nature of the crime has been criticized by other courts, in that it ignores the evil influence of the acts, and that if logically carried out, it would result in the ruling that the crime could not be committed where a married woman was past the age of childbearing or was barren, for in such case there could be no danger of a spurious issue. These courts have accordingly adopted a broader view, and look upon the offense as one against the marital relation. Under this theory there is no distinction between the act committed by the husband or the wife. Adultery under this view of the offense is the voluntary sexual intercourse by a married person with one other than the husband or wife.

Under this definition some of the courts have held that where either of the parties to the illicit intercourse is married, both are guilty of adultery,[32] while other courts hold that if one of the parties is unmarried that one is guilty only of fornication, and the married party is guilty of adultery.[33]

Some of the states, to avoid all uncertainty, have specifically provided what shall amount to adultery. Thus in Pennsylvania the statute reads: "If any married man shall have carnal connection with any woman not his lawful wife, or any married woman have carnal connection with any man not her lawful husband, he or she so offending shall be deemed guilty of adultery." In Michigan the statute provides that adultery has the same meaning as when used in reference to the cause of a divorce, and the same which it bears according to the common usages of mankind.[34]

[32] State vs. Hunton, 6 Ala., 684; State vs. Wilson, 22 Iowa, 364.

[33] Com. vs. Lafferty, 6 Grat. (Va.), 672; Miner vs. State, 58 Ill., 59; Cook vs. State, 11 Ga., 54.

[34] Howell's Statutes, Sec. 9278.

To constitute the offense, then, one at least of the parties must be married, and the acts which constitute the crime must be done voluntarily on the part of the defendant. If the defendant acts voluntarily, it is immaterial what the attitude of the other person is, for he is equally guilty whether the connection be effected by consent or by force and against the will of the other person.[35]

Illicit sexual intercourse by one divorced is not adultery if the other party is unmarried. If, however, the divorce is invalid, the person divorced is guilty of the offense, even though he honestly believes the divorce to be valid.[36]

In those states where the statutes forbid the guilty party in divorce proceedings from marrying, the question has arisen as to whether such guilty one is guilty of adultery in having intercourse with an unmarried person.

This question came up in the case of State vs. Wetherby, 43 Me., 258, where the defendant's wife, having obtained a divorce from him for his fault, he afterwards married again contrary to the statute, and was arrested for adultery with his second wife. In that case the court said: "Adultery in this state can only be committed by parties one of whom at least is married, and by parties who are not married to each other. To affirm that a person is married and yet has no legal husband or wife is manifestly a solecism in the very nature of things; the marriage

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[35] State vs. Donovan, 61 Iowa, 278; 4 Am. Cr., 25.

[36] State vs. Whitcomb, 52 Ia., 85. The fact that the defendants were married and cohabited as man and wife in good faith under the advice of a justice of the peace, believing that they were not committing an offense, is not a defense, since ignorance of the law does not excuse them. State vs. Goodenow, 65 Me., 42; 1 Am. Cr., 42.

contract under such circumstances cannot exist. There cannot be a husband without a wife, nor a wife without a husband. * * * There is no law in this state which declares that such acts as have been proven against the defendant constitute the crime of adultery, nor would those acts constitute the crime at common law."

If the spouse of the defendant has been absent and unheard of for so long a period as to create a presumption of death, and a second marriage is contracted in good faith, cohabitation thereunder does not make one guilty of adultery, for the presumption in effect is that there is no existing marriage.[37]

So also where one innocently marries a person already married, he is not guilty of adultery if the cohabitation under such marriage is in ignorance of the previous marriage.[38]

LEWD AND LASCIVIOUS COHABITATION.

As we have seen, the common law did not punish single acts of adultery or fornication if committed in private. The common law, however, endeavored to protect public morals, and accordingly we find that open and notorious lewdness or lascivious conduct was punished as a misdemeanor.

Thus, the frequenting of houses of illfame, the indecent exposure of one's person to public view, and all acts which were grossly and publicly indecent, were punished by fine and imprisonment at common law.

One of the most common offenses against the public morals was, and is, that of lewd and lascivious cohabitation. This offense is one against public

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[37] Com. vs. Thompson, 6 Allen, 591.
[38] Vaughan vs. State, 83 Ala., 55; 7 Am. Cr., 58.

decency and good morals, and the student will at once see that the openness or notoriety of the act is an essential element of the offense.

Lascivious cohabitation, if not committed under circumstances that may be called notorious, is not a crime at the common law. It is somewhat difficult to define what conduct will be deemed open and notorious under all circumstances.

If the conduct is of such nature as that it necessarily must be or become public, it is open and notorious.[39]

In the absence of a statute to the contrary, cohabitation under circumstances that do not create a public scandal does not constitute the offense.

Thus, the proof of cohabitation under an honest though mistaken belief that the parties are legally married, does not support an indictment for lewd and lascivious cohabitation.[40]

To constitute cohabitation there must be more than a single unlawful interview; there must be a living and dwelling together in open and improper relationship. Under the statutes the word cohabit is generally construed to mean the living together in the same house as man and wife.[41]

The offense is now generally regulated by statute. In some of the states it includes private, as well as public, illicit intercourse, but as a general rule the statutes follow the common law, so that occasional unlawful interviews are not sufficient to make one guilty of the offense.[42]

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[39] State vs. Moore, 1 Swan (Tenn.), 136.

[40] State vs. Marvin, 12 Iowa, 499.

[41] Pruner vs. Com., 82 Va., 115.

[42] State vs. Berry, 24 Mo., App., 466; Pruner vs. Com., 82 Va., 115; Com. vs. Calef, 10 Mass., 153.

Illicit sexual intercourse with a single individual is not prostitution. Osborn vs. State, 1 Am. Cr., 25.

SEDUCTION.

Seduction is a statutory crime of modern origin. At the common law only a civil action for damages lay, at the suit of one to whom the female seduced stood in the relation of a servant, the gist of the action, anciently, in fact, and latterly, in theory, consisting in loss of the services of the woman seduced; or, as it was expressed in the old Latin legal phrase, "per quod servitium amisit." Decisions and statutes have effected great changes in the character of the civil action.

The gist of the crime of seduction consists in leading a woman away from the path of virtue, which she is honestly pursuing at the time of the seduction.

PROMISE OF MARRIAGE.

There are two kinds of statutes defining and punishing the crime of seduction. In some of the states, as in New York, the statutes only punish a seduction which is accomplished by means of a promise of marriage, upon which the woman seduced in good faith relies. Under such statutes no conviction can be had for seduction where the prosecutrix knows that the accused is married at the time of the promise.[43] But there are other states which make no mention of a promise of marriage. In those states the crime of seduction may be committed without any promise of marriage, and even by a man whom the woman seduced knows at the time to be married.[44]

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[43] People vs. Alger, 1 Park. Cr. Rep., 333; Norton vs. State, 72 Miss., 128; 9 Am. Cr., 606.

[44] Wood vs. State, 48 Ga., 192; Andre vs. State, 5 Iowa, 389.

THE WOMAN SEDUCED.

The age of the woman is not important, as a matter of law. It is important, as a matter of fact, as helping to determine whether in fact the man did obtain such a control over her will as is necessary in seduction. It is a universal requirement that the woman should be unmarried. There is no such thing in the law as criminal seduction of a married woman, but a widow, or divorced woman, or a woman who was at one time unchaste but has reformed,[45] comes within the protection of the statutes. So far as the personality of the woman is concerned, it is only necessary that she should be unmarried and virtuous, or, as the statutes frequently express it, chaste.

There is no difference in the legal meaning of these words, nor is there any conflict in the law as to what constitutes a chaste or virtuous woman within the meaning of the statutes. She must be pure-minded and honestly pursuing the path of virtue. She may never have submitted to the embraces of a man and still not be chaste or virtuous. If she is impure or unchaste in her mind she is not virtuous or chaste within the meaning of the law. The Supreme Court of Georgia, in the case before cited,[46] criticized an instruction on the part of the trial judge, who instructed the jury as follows: "It must appear from the testimony that she was, at the date of the alleged seduction, a virtuous, unmarried female. The test is to be applied to her at that date, and not at a subsequent period. The presumption of the law is that she was virtuous, and that presumption remains until

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[45] State vs. Timmens, 4 Minn., 325; People vs. Millspaugh, 11 Mich., 278; State vs. Carron, 18 Iowa, 372.
[46] Wood vs. State, 48 Ga., 182.

removed by the proof.[47] She must have had personal chastity. If she, at that time, had never had unlawful sexual intercourse with man; if no man had then carnally known her, she was a virtuous female within the meaning of this law. If man had then carnally known her, had had unlawful sexual intercourse with her, she was not a virtuous female within the meaning of this law." This was held to be error. The Supreme Court say: "Virtue is a thing of the heart and mind. A woman who has been guilty of fornication has done an act showing that she is not of a virtuous heart, or at least, that she was not at the time of the act. The evidence, it is true, is very conclusive, but it does not at all follow that she is a virtuous woman because she has not broken the law, no more than it follows that a man is honest because he has not violated the law against stealing.

To be guilty of the crime of seduction is one thing, and to induce a woman to commit fornication is another. The crime of seduction involves purity of heart and a chaste mind in the woman seduced. She must be led away from virtue. The definition of the judge would exclude a woman, who, years before, had been guilty of fornication, but who had repented and was now perfectly virtuous; perhaps the more so that she had once sinned and repented in sackcloth and ashes. And this definition of a seducible woman is, as I believe, contrary to the general sense of the word, as used both in England and America."

WHAT CONSTITUTES SEDUCTION.

This crime is, perhaps, the most difficult of all crimes to define in precise terms. It is certain that

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[47] Barker vs. Com., 90 Va., 820; 9 Am. Cr., 614; but for a contrary rule see State vs. Lockerby, 50 Minn., 363; 9 Am. Cr., 617.

simply inducing a woman to consent to sexual intercourse by reason of her reliance on a promise of something beneficial to her is not seduction, even though it is a promise of marriage.[48] This would make it a mere bargain, a matter of traffic, and such a transaction does not come within the terms of the statutes.

The accused must have had illicit intercourse with the woman, the words seduction ex vi termini, implying sexual intercourse.[49] And such illicit intercourse must have been obtained by means of a control over the mind, will, or affections of the prosecutrix obtained by the seducer, and after obtaining such control, by persuasions, arguments or inducements held out. There can be no seduction until after such a control or influence has been acquired by the person accused of seduction.

The Supreme Court of Wisconsin, in Croghan vs. State, 22 Wis., 444, which was a prosecution for seduction, in defining the difference between seduction and rape, use this language: "But the word seduction, when applied to the conduct of a man towards a female, is generally understood to mean the use of some influence, promise, arts, or means on his part, by which he induces the woman to surrender her chastity and virtue to his embraces. But we do not suppose that it must appear that any distinct promise was made to the female, or any subtle art or device employed. It is sufficient that the means used to accomplish the seduction, and induce the female to consent to the sexual intercourse. Perhaps the motive of fear on the mind of the female is not to be excluded — not the fear of personal violence and injury unless she consent to the connection, but a fear

[48] People vs. Clark, 33 Mich., 112; State vs. Reeves, 8 Am. Cr., 698.
[49] State vs. Bierce, 27 Conn., 319.

that the man may in some way injure her reputation or standing in society, unless she yields to his importunities; but the woman must be tempted, allured and led astray, from the path of virtue, through the influence of some means or persuasion employed by the man, until she freely consents to the sexual intercourse."

INCEST.

Incest is the sexual intercourse between persons related to each other, in the degrees within which marriage is prohibited by law with a knowledge of such relationship.

Incest, like adultery, was not a crime at the common law, but it is now indictable as a felony under the statutes of the different states. As a usual thing, the statutes forbid the marriage of persons within the first three degrees of consanguinity, which includes parent and child, brother and sister,[50] aunt and nephew or uncle and niece.

Under some of the statutes persons within certain degrees of relationship by affinity, as well as consanguinity, are prohibited from marrying.

Thus, under the statute of Ohio, which provides that "persons nearer of kin by consanguinity or affinity than cousins," having sexual intercourse, should be guilty of incest; the court held that a brother-in-law and a sister-in-law were nearer of kin than cousins.[51]

So under some statutes the sexual intercourse between a step-father and step-daughter, or step-mother and step-son, is incest during the existence of the marriage through which the parties were related.[52]

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[50] The relationship of brother and sister includes half-brother and half-sister.

[51] Noble vs. State, 22 Ohio St., 541.

After the death of one of the parties to this marriage the relationship of course would cease, and any subsequent intercourse would not be incestuous. It is no defense that one of the parties was illegitimate, providing the relationship is within the prohibited degrees.[53]

Neither is it any defense that the intercourse was had under a void marriage. The crime is complete on a single act of sexual intercourse.[54]

Under some of the statutes the courts hold that if the act is not consented to by both parties, the crime is rape and not incest; [55] while other courts hold that the fact that the intercourse was accomplished by force does not change the nature of the crime as to the person exercising the force.[56] As a general rule, under the statutes, knowledge of the relationship is an essential element of the crime.[57]

SODOMY

Sodomy is the carnal knowledge against the order of nature by two persons with each other, or of a human being with a beast.

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[52] Norton vs. State, 106 Ind., 163; Banner vs. State, 49 Ind., 544.

[53] People vs. Lake, 110 N. Y., 61.

[54] State vs. Brown, 47 Ohio St., 102; 8 Am. Cr., 373.

[55] De Groat vs. People, 39 Mich., 124.

[56] Norton vs. State, 106 Ind., 163; Mercer vs. State, 17 Tenn. App., 452.

[57] Banner vs. State, 49 Ind., 544; 1 Am. Cr., 354.

State vs. Ellis, 70 Mo., In this case the court held that if the defendant knew of the relationship between him and his daughter, and she was ignorant of it, he would be guilty of incest if the illicit connection was by mutual consent, although she could not have been guilty of incest because ignorant of the relationship existing between her and the defendant.

In some states the courts hold that a knowledge of the relationship is not required. State vs. Wyman, 59 Vt., 529.

The offense is named sodomy from the prevalence of the sin in the city of Sodom.

The term is synonymous with buggery, and is frequently spoken of as "the abominable and detestable crime against nature."

Sodomy is an offense at common law, but there is some doubt whether under the common law of the different states it is a felony or a misdemeanor.[58]

The offense may be committed between a man and a woman, or between two male persons, or between a man or a woman and a beast. A fowl is not regarded as a beast.

The requisites as to penetration and emission are as a general rule the same as are required in the crime of rape.

At common law the proof of emission and penetration is necessary, and this is still the rule in some states.[59] In other states statutes have been passed changing the common law in this respect, so that proof of penetration only is necessary.[60]

The consent of the parties to the act is no defense and both are equally guilty.

A penetration of the mouth is not sodomy; it must be per anum.[61]

MISCEGENATION.

Miscegenation is a mixture of the white and black races in sexual intercourse, and consists in cohabitation by marriage, or otherwise, of a white person of either sex with a negro.[62]

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[58] 2 Bish. on Cr. Law, Sec. 1196.

[59] People vs. Hodgkin, 94 Mich., 27. In this case the court also held that a proof of emission could be inferred from penetration and other circumstances.

[60] Com. vs. Thomas, 1 Va. Cas., 307; Comstock vs. State, 14 Neb., 205.

[61] Prudle vs. State, 31 Tex. Cr. R., 551.

[62] Bouv. Law Dictionary.

In some states statutes have been passed prohibiting the intermarriage of a white person and a negro. These statutes have been held not to violate the fourteenth amendment to the constitution, which prohibits a state from denying to any person within its jurisdiction the equal protection of its laws, and they are constitutional.[63]

Cohabitation under a marriage by persons prohibited by these statutes from marrying, makes the parties guilty of fornication.[64]

ABORTION.

Abortion is the procuring of the miscarriage of a pregnant woman.

At the common law the killing of a child en ventre sa mere was not regarded as either murder or manslaughter, for such a child was not considered as a human being.[65] The common law did, however, take notice of wilfully procuring an abortion, where the child had quickened in the mother's womb, and punished it as a misdemeanor.[66] But the procuring of a miscarriage before the child had quickened, if done with the consent of the mother, was not an offense at common law.[67] If, however, as a result of acts intended to produce an abortion, the woman operated upon died, the offense was murder at the common law.[68]

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[63] Pace vs. State, 69 Ala., 231; Pace vs. State, 106 U. S., 583.

[64] Green vs. State, 58 Ala., 190; State vs. Bell, 7 Baxt., Tenn., 9.

[65] See Ante, under title Homicide.

[66] Mitchell vs. Com., 78 Ky., 204; Com. vs. Bangs, 9 Mass., 387.

[67] 2 Com. vs. Parker, 9 Metcalf, 263.

[68] 4 Blk. Com., 201.

Many, if not all the states have remedied the defects in the common law by statutes which define and punish abortion. As a general rule, the statutes provide that any person who shall administer to any woman, pregnant with a quick child, any medicine or drug, or shall use any instrument or other means, with intent to destroy the child, shall in the case of the death of the child or the mother, as a result of such acts, be deemed guilty of manslaughter.[69]

The statutes, also, as a general rule, punish the administering of drugs, or the employment of any other means, with the intent to procure the miscarriage of any pregnant woman, whether the foetus has quickened or not.[70]

In some states the statutes forbid the advertising for sale of any drugs or instruments used for the purpose of procuring abortions, and in other states it is an offense to have in one's possession any drugs or instruments of the above descripiton.[71]

Under the statutes the offense is complete on the administering of the drug, or the use of an instrument, even though the result desired be not attained, providing, of course, that the act was committed with the intent to produce a miscarriage.[72]

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[69] People vs. Olmstead, 30 Mich., 431.

[70] People vs. Olmstead, 30 Mich., 430; Com. vs. Wood, 11 Gray (Mass.), 85; State vs. Howard, 32 Vt., 380. Under these statutes the death of the person operated on is not an element of the offense, but the death of such person may subject the offender to a greater degree of punishment. Railing vs. Com. (Pa.), 6 Am. Cr., 7.

[71] State vs. Forsyth, 78 Ia., 595.

[72] State vs. Owens, 22 Minn., 238; Wilson vs. State, 2 Ohio, 319. In State vs. Fitzgerald, 49 Ia., 260, the court held that it was no defense to an attempt to commit an abortion that the drug administered was harmless.

The child, however, may be killed if it is necessary in order to save the mother's life. As a general rule, under the statutes, the child should not be killed for the purpose of saving the life of the mother except upon the advice of two physicians.

Under the statute punishing the administering of "any substance" with the intent to procure a miscarriage, the courts have held that it is of no consequence that the substance administered could not accomplish the result desired, providing it was administered for the purpose of procuring a miscarriage.[73]

There must be an intent to procure a miscarriage at the time the means are used, and if there is not any such intent the offense is not committed.

Thus a husband, who, by a violent act toward his wife, should produce a miscarriage without any such purpose in view, is not guilty of this offense.[74]

NUISANCES.

The common law took notice of, and endeavored to protect, the public health, morals, comfort, and the general welfare of the community. It accordingly punished nuisances which affected the public at large.

A common or public nuisance is such unlawful conduct, or omission of duty, as produces a material injury or annoyance to the community at large.

Public nuisances are distinguished from private nuisances in this, that the latter affect certain individuals only, while the former affect the community.

The student will notice that this distinction is based not on an inherent difference in the nature of the acts themselves, but in the extent of the effect

[73] State vs. Fitzgerald, 49 Iowa, 260; 3 Am. Cr., 1; State vs. Gedicke, 43 N. J., 86; 4 Am. Cr., 6.

[74] Slattery vs. People, 76 Ill., 217; 1 Am. Cr., 29.

of such acts. An act or omission may under certain circumstances amount to a common nuisance, which under other circumstances is entirely lawful and proper.

"Even what is a nuisance per se may be carried on in a remote locality so as to be no common annoyance to the public. And on the other hand, what is not a nuisance per se, such a trade as has been harmlessly and beneficially carried on for years in a particular locality, may become a public nuisance, without any change in the way it is conducted, by reason of public streets being laid out near it, or numerous dwellings erected in its vicinity, so that it becomes a serious annoyance." [1]

Common nuisances are indictable at common law as misdemeanors; private nuisances are redressed by a civil suit.

It is somewhat difficult to draw any exact line between a private or public nuisance.

To amount to a public nuisance the act or omission must injuriously affect some right in which the public, in their aggregate capacity, have a common interest as distinguished from a mere individual or private right.[2]

A nuisance may be created in many ways, and may consist of any act or omission which affects the public health, comfort, morals, or which prevents, or injuriously affects the exercise of, rights in which the public have a common interest.

The following examples may be given:

The carrying on of a manufacturing business in a populous community in such a manner as to directly

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[1] State vs. St. Louis Board of Health, 16 Mo. App., 8.
[2] People vs. Jackson, 7 Mich., 432.

injure the health of others or damage their property.[3]

The manufacturing of gunpowder in a place which renders it dangerous to the public.[4]

The dumping of unwholesome matter into a stream from which the public drink;[5] the maintaining of a slaughter house in a populous district.[6]

So also acts which affect public order and decency may be nuisances. Thus, the keeping of disorderly houses, bawdy house, gambling places, are at common law regarded as common nuisances, since their "tendency to withdraw the young and inconsiderate from any useful employment of their time and to subject them to various damages; from their affording to the idle and dissolute encouragement to continue in their destructive courses." [7]

Indecent exposure of the person, and exhibition of obscene pictures, are also nuisances at the common law.

So also, at common law, a common scold, that is, a woman who indulges in such free use of her tongue as to disturb the quietude of the neighborhood; and "eavesdroppers, being such as listen under walls or windows or the eaves of houses, to hearken after discourse, and thereupon to frame slanderous and mischievous tales," are nuisances at common law.[8]

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[3] People vs. White Lead Works, 82 Mich., 471.

[4] Bradley vs. People, 56 Barb. (N. Y.), 72.

[5] State vs. Taylor, 29 Ind., 517.

[6] 10 Bosw. (N. Y.), 700; Dennis vs. State, 91 Ind., 291.

[7] People vs Jackson, 3 Denio., 101; Thatcher vs. State, 48 Ark., 60; Beard vs. State, 71 Ind., 275; State vs. Barthel, 6 Black. (Ind.), 474; McLean vs. State, 49 N. J. Law, 471; State vs. Dame, 60 N. H., 479; 4 Am. Cr., 444.

[8] 4 Blk. Com., 168. The loud and boisterous singing for ten minutes of an obscene song, on a public street, in the hearing of a number of persons, was held to be a nuisance though done only on one occasion. State vs. Toole, 106 N. C., 736; 8 Am. Cr., 608.

Public swearing in a public place to the annoyance of the community is a nuisance.[9]

A common form of a public nuisance consists in the obstruction of highways and of streams, being such acts as interfere with public travel, or of any public right in the highway, or on navigable rivers.[10]

An example of the omission of duty under such circumstances as would amount to a nuisance, is found in the case of one neglecting to perform his duty as a highway officer, so that the right of the public to use it becomes impaired.[11]

The intent or motive of the persons creating a nuisance is immaterial. If there is an injury to the community at large, the fact that the persons were actuated by the purest and most benevolent of purposes is no defense.[12]

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[9] Com. vs. Linn., 158 Pa., St. 22; 9 Am. Cr., 412.

[10] Knox vs. New York, 55 Bar. (N. Y.), 404; Com. vs. Allen, 1488a St., 358; Bee vs. State, 94 Ind., 443; State vs. Club, 100 N. C., 477.

[11] State vs. Madison, 65 Me., 546.

[12] Secord vs. People, 121 Ill., 623.

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